Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL T. REILLY, *Petitioner*,

v.

NATWEST MARKETS GROUP INC., and NATWEST MARKETS, a division of National Westminster Bank, PLC, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Only Federal district courts can make, enter, and enforce judgments. The authority of Federal appellate courts to change those judgments is derivative from their power to control district court proceedings. Federal appellate courts can reverse district court judgments, but are almost wholly without authority to order judgments *non obstante verdicto* (or judgments *n.o.v.*) under Federal Rule of Civil Procedure 50(d), where the sufficiency of the evidence is not in doubt. *Neely v. Martin K. Eby Constr. Co.*, 386 US 317 (1967)(hereinafter "*Neely*"); *Hetzel v. Prince William County, VA*, 523 US 208 (1998))(hereinafter "*Hetzel*").

In this commercial dispute for compensatory damages founded on diversity jurisdiction, (a) Respondents did not challenge the sufficiency of evidence, and (b) the presentation of alternative remedies was available under state substantive law. Alternative claims for relief are permitted under Rule 8(a) and 8(e)(2), and were expressly permitted by the district court's Rule 16(e) pretrial order.

The question presented is whether the Second Circuit, without invoking Rule 50(d) or this Court's standards for its application, can reverse a proved and elected *quantum meruit* jury verdict, and order the district court to enter a judgment *n.o.v.* in an amount equal to Petitioner's breach of contract award that he also proved but did *not* elect?

Respondents conceded on appeal the not elected breach of contract amount was due to Petitioner. The Second Circuit's sole basis for the *n.o.v.* order was the common law procedural doctrine of election of remedies which has been abolished in federal courts by Rule 8.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Cited Authorities iii

Opinions Below 1

Basis for Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 11

I. The Order Below Lacks Rule 50(d) Authority Under Prior Rulings Limiting Federal Appellate Judgments *n.o.v.* 11

II. The Opinion Below Conflicts With This Court's Rulings And Other Circuit Decisions Regarding Pretrial Orders 20

III. The Opinion Below Conflicts With Other Circuits' Rulings On Rule 8, Which Abolished Election Of Remedies 21

Conclusion 30

TABLE OF CITED AUTHORITIES

Cases Cited:

Allstate Insurance Co. v. James,
779 F3d 1536 (11th Cir. 1986).....28
American Int'l Adjustment Co. v. Galvin,
86 F3d 1455 (7th Cir. 1996).....27
Baldwin County Welcome Center v. Brown,
466 US 147 (1984).....23
Berger v. State Farm Mutual Auto. Ins. Co.,
291 F2d 666 (10th Cir. 1961).....28
Bernstein v. United States, 256 F2d 697 (10th Cir. 1958),
cert. dismissed per stipulation, 358 US 924 (1959).....28
Breeding v. Massey, 378 F2d 171 (8th Cir. 1967)..... 23, 27
Brookhaven Landscaping & Grading Co. v. J F Barton
Contracting Co., 676 F2d 516 (11th Cir. 1982).....28
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 US 477 (1977).....13
Cabinetree of Wisc., Inc. v. Kraftmaid
Cabinetry, Inc., 50 F3d 388 (7th Cir. 1995).....27
Campbell v. Barnett, 351 F2d 342 (10th Cir. 1965).....28
Cone v. West Virginia Pulp & Paper Co.,
330 U.S. 212 (1947).....14
Conley v. Gibson, 355 US 41 (1957).....20
Crawford-El v. Britton, 523 US 574 (1998).....23
Cunningham v. Hamilton County, Ohio, ___ US
___, 119 SCt 1915 (1999).....29
Deposit Co. of Maryland v. Krout,
146 F2d 531 (2d Cir. 1945).....24
Erie R. Co. v. Tompkins, 304 US 64 (1938)..... 16, 22, 23
Fort Vancouver Plywood Co. v.
United States, 860 F.2d 409 (Fed. Cir. 1988).....28
Fountain v. Filson, 336 US 681 (1949).....14
Friederichsen v. Renard, 247 US 207 (1918).....22

Globe Liquor Co. v. San Roman, 332 US 571 (1948).....14
Grappo v. Alitalia Linee Aeree Italiane SpA,
56 F3d 427 (2d Cir 1995).....25
Grogan v. Garner, 806 F.2d 829 (8th Cir. 1986).....27
Hanna v. Plumer, 380 US 460 (1965).....15, 22
Henry v. Daytop Village, Inc., 42 F3d 89 (2d Cir. 1994)...25
Hetzel v. Prince William County, VA,
523 US 208 (1998).....i, 13, 18
In re Gens, 112 F3d 569 (1st Cir. 1997).....27
In re King Enterprises, 678 F2d 73 (8th Cir. 1982).....24
In re Mann Farms, Inc., 917 F2d 1210 (9th Cir. 1990).....28
International Union, UAW Local
283 v. Scofield, 382 US 205 (1965).....11
Johnson v. New York, NH & H R Co.,
344 US 48 (1952).....13
Koedding v. Slaughter, 481 F Supp 1233
(ED Mo. 1979), *aff'd*, 634 F2d 1095 (8th Cir. 1980). 23
Kumho Tire Co. v. Carmichael, 526 US 137 (1999).....29
Leatherman v. Tarrant County NICU,
507 US 163 (1993).....23, 30
Little v. Texaco, Inc., 456 F2d 219 (10th Cir. 1972).....23
MacFarlane v. Grasso, 696 F2d 217 (2d Cir. 1982).....24
Marcella v. ARP Films, Inc., 778 F2d 112 (2d Cir. 1985).25
Matthews v. United States, 485 US 58 (1988).....23
McCalden v. California Library Assn., 955 F2d 1214
(9th Cir. 1990), *cert. denied*, 504 US 957 (1992.....27
Molsbergen v. United States, 757 F2d 1016 (9th Cir.),
cert. dismissed, 473 US 934 (1985).....27
Montgomery Ward & Co. v. Duncan,
311 US 243 (1940).....13
Neely v. Martin K. Eby Constr. Co.,
386 US 317 (1967).....passim
New York v. Hill, 92 NY2d 406 (1998),
cert. granted, 119 SCt 1754 (1999)(No. 98-1299).....10
Newman & Schwartz v. Asplundh Tree Expert Co.,
102 F3d 660 (2d Cir. 1996).....25

Newman-Green, Inc. v. Alfonzo-Larrain,
490 US 826 (1989).....11
Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F2d 1363 (7th Cir. 1990).....26, 27
Pulliam v. Gulf Lumber Co., 312 F2d 505 (5th Cir. 1963).....27
Reilly v. NatWest Markets Group, Inc.,
181 F3d 253 (2d Cir. 1999).....1
Reilly v. NatWest Markets Group, Inc., et al,
No. 96-cv-0641 (S.D.N.Y. August 11, 1998).....1
Riverwoods Chappaqua v. Marine Midland Bank, NA, 30 F3d 339 (2d Cir. 1994).....25
Ruhrgas AG v. Marathon Oil Company,
___ US ___, 119 SCt 1563 (1999).....29
Rule v. Brine, Inc., 85 F3d 1002 (2d Cir. 1996).....25
Scott v. District of Columbia, 101 F3d 748 (DC Cir. 1996), *cert. denied*, 520 US 1231 (1997).....27
Smith v. Washington Sheraton Corporation,
135 F3d 779 (DC Cir. 1998).....21
Strong v. Reeves, 114 N.Y.S.2d 97 (App Div, 3d Dept 1952), aff'd. 306 NY 86 (1953) 26
Swint v. Chambers County Comm'n, 514 US 35 (1995)...29
Tyler v. Magwire, 84 US 253 (17 Wall. 253) (1872).....11
United States v. Degen, 517 US 820 (1996).....29
United States v. Generes, 405 US 93 (1972).....13
United States v. Hougham, 364 US 310 (1960).....21
United States v. Kales, 314 US 186 (1941).....22
United States v. Oregon Lumber Co.,
260 US 290 (1922).....22
Weade v. Dichmann, Wright & Pugh,
337 US 801 (1949).....14
Whitt v. E. I. DuPont de Nemours & Co.,
461 F2d 1152 (6th Cir. 1972).....27
Wilton v. Seven Falls Co., 515 US 277 (1995).....29

Statutes Cited:

28 USC §1254(1) 1
28 USC §2071 2
28 USC §2072 ..... 2, 11
28 USC §2105 ..... 2, 14
28 USC §2106 ..... 2, 14
NY Labor Law §193 6
NY Labor Law §198(1-a) 7, 9, 16

United States Constitution Cited:

US Const. Amend. VII 2, 15, 21, 26

Rules

F R App P 2 14
F R App P 41 11
F R Civ P 1 11
F R Civ P 16(d) 10
F R Civ P 16(e) ..... passim
F R Civ P 30(b)(6) 6
F R Civ P 50 ..... passim
F R Civ P 50(a)(1) 17
F R Civ P 50(b) ..... passim
F R Civ P 50(d) ..... passim
F R Civ P 59 ..... 7, 12, 18
F R Civ P 8 ..... passim
F R Civ P 8(a) ..... i, 23, 27
F R Civ P 8(e)(2) ..... passim
NY CPLR 3014 25
NY CPLR 3017(a) 25
NY CPLR 4111 12

NY CPLR 5001 12

Other Authorities Cited:

2A Moore's Federal Practice ¶8.32, at 8-214-15 (2d ed. 1994) 24

35A *Corpus Juris Secundum*, Federal Civil Procedure § 398 (1960) 24

Wright & Miller, *Federal Practice and Procedure: Civil 2d* §1044 24

Wright & Miller, *Federal Practice and Procedure: Civil 2d* §1283 24

Wright & Miller, *Federal Practice and Procedure: Civil 2d* §1235 24

Wright & Miller, Federal Practice And Procedure: *Civil 2d* §2537 19

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit Filed June 17, 1999 ..... 1a

Appendix B — Order of the United States District Court for the Southern District of New York Filed August 14, 1998..... 32a

Appendix C — Amended Judgment of the United States District Court for the Southern District of New York Filed August 13, 1998..... 36a

Appendix D — Order of the United States District Court for the Southern District of New York Filed June 8, 1998..... 37a

Appendix E — Order of the United States District Court for the Southern District of New York Filed May 6, 1998..... 42a

Appendix F — Order of the United States Court of Appeals for the Second Circuit Filed July 29, 1999 ..... 45a

Appendix G — Excerpts from Statutes and Constitutional Provisions Cited 47a

Appendix H — June 9, 1997 Liability Phase Jury Verdict 50a

Petitioner, Michael T. Reilly,[1] respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Reilly v. NatWest Markets Group, Inc.*, 181 F3d 253 (2d Cir. 1999). (A:1a-31a) The opinion of the district court in *Reilly v. NatWest Markets Group, Inc., et al.* No. 96-cv-0641 (S.D.N.Y. August 11, 1998) is not published (A:32a-35a).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Second Circuit") was entered on June 17, 1999. The Second Circuit denied a timely petition for rehearing on July 29, 1999 (A:45a-46a).

By letter dated October 8, 1999, Petitioner was notified that his application for an extension of time to file a petition for writ of certiorari to and including December 13, 1999 was granted by Justice Ginsburg under Application No. 99A285.

The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

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[1] Petitioner is a member of the bars of this Court and of the Commonwealth of Pennsylvania. All emphasis in the text and quoted materials is supplied unless otherwise noted. Internal citations and periods used in certain abbreviations have been omitted. "A:" refers to the Appendix in this Petition; "JA:" refers to the Joint Appendix in the Second Circuit.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 USC §§ 2071, 2072, 2105 and 2106, and The Seventh Amendment to the US Constitution are set forth in the Appendix (A:47a-49a).

Federal Rule of Civil Procedure 8(a) provides:

> A pleading . . . shall contain . . . a demand . . . for the relief the pleader seeks. Relief in the alternative . . . may be demanded.

Federal Rule of Civil Procedure 8(e)(2) provides:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically. . . . A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

Federal Rule of Civil Procedure 16 (e) provides

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Federal Rule of Civil Procedure 50(d) provides:

> If the motion for judgment as a matter of law is denied, the party who prevailed on that motion

> may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

The Second Circuit ordered the district court to enter a judgment *n.o.v.* that, Petitioner submits, was and is outside its authority under the Federal Rules of Civil Procedures ("Rule(s)") and this Court's prior rulings. The fundamental question presented is whether the Second Circuit could give the *n.o.v.* order it gave to the district court; and if so, was that order permitted by the Rules.

The Second Circuit's judgment *n.o.v.* order sets the amount of compensatory damages equal to that which Respondent *conceded* was due to Petitioner. The concession occurred only on appeal and *well after* the district court's judgment, based on two jury verdicts, had been entered. A federal appellate *n.o.v.* order based on a now *conceded* damages amount, however, is not proper. The threshold question is whether an appellate court can retroactively order that *any* amount be substituted for a proven and elected jury award where, as here, the sufficiency of the evidence is not in doubt. A concession may be relevant for other purposes, however. While that waiver is now binding on Respondent (A:14a), it should not bind Petitioner to the same result.

A. Background of the Second Circuit Judgment.

The facts are in Appendix A except as amplified and noted. Petitioner was employed by Respondent[2] pursuant to an agreement guaranteeing employment for two years, unless Petitioner was terminated *for cause*. The agreement had three compensation components: (1) salary, (2) Percentage Bonus, and (3) discretionary bonus. (A:3a-4a)

Notwithstanding the two year guaranteed employment provision, Respondent terminated Petitioner after 18 months. No substantive reason was given for the termination. Petitioner was barred from Respondent's premises and was not permitted to take any files with him. Relying on Respondent's representation of prompt payment for past services, Petitioner continued to work on certain transactions designated by Respondent from his home. (A: 3a) After unsuccessful negotiations and some four months after the termination, Respondent's then chief legal officer sent a letter to Petitioner's attorney, stating for the first time that Respondent (1) had "cause" to terminate Petitioner, and (2) was ceasing all further negotiations regarding payments due for past services,. Under the agreement, cause was the only basis for not making those payments. (JA:264) (A "cause" termination, even if only alleged in writing, by an investment bank's chief legal officer, is a serious matter in the securities industry.). Immediately before the expiration of the agreement, Petitioner commenced a suit against Respondent in the

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[2] To conform to the style adopted by the Second Circuit in the petitioned from case, Petitioner refers to defendants, NatWest Markets Group, Inc. and NatWest Markets, a division of National Westminster Bank, Plc, individually and collectively as "Respondent".

Southern District of New York, alleging, in the alternative, breach of contract and *quantum meruit* claims. (JA:1-13)

Respondent's initial answer denied any liability to Petitioner. In an amended answer and counterclaim, Respondent maintained those defenses, and also asserted a variety of counterclaims against Petitioner, and companies of which he was the sole shareholder, seeking recovery of all past payments to Petitioner and additional specified and unspecified damages amounting to over $3.4 million. In the June 1997 liability phase trial, the jury found that Respondent had (a) "breach[ed Petitioner's] employment contract and terminate[d] him without cause [on August 24, 1995], (b) there was a "willful failure on [Respondent's part] to pay [Petitioner] monies owed to him that he had earned prior to termination", and (c) all of the facts required for Respondent's counterclaims against Petitioner were decided in Petitioner's favor. (A:50a-52a)

After Respondent's liability phase post-trial motions pursuant to Federal Rules of Civil Procedure (hereinafter "Rule(s)") 50/59 were denied, discovery "commenced on the damages issues, including *quantum meruit*." (A:3a-4a) Petitioner requested production of his transaction files ("Deal Files"), relevant for establishing both breach of contract and *quantum meruit* claims.

In March 1998, Respondent requested supplemental discovery on Petitioner's *quantum meruit* claim theory, and after Petitioner submitted the requested information (JA:70), Respondent brought a motion *in limine* requesting that Petitioner be restricted to only those matters listed on one of the exhibits Petitioner had submitted. On April 3, 1998, the district court, *inter alia*, granted Respondent's motion and ordered "that no evidence concerning the transactions that do not comprise part of [Petitioner's]

damage claim as set forth in Exhibit A to [Petitioner's] March 13, 1998 Supplemental Interrogatory Answer shall be presented in evidence at trial except as rebuttal evidence." (JA:76) The transactions listed in that exhibit represented the heart of Petitioner's *quantum meruit* recovery evidence permitted by the Order.

At the May 5, 1998 final pretrial conference, the district court considered the parties' pretrial briefs and heard oral argument. On May 6, 1998, citing New York substantive law as applied by the Second Circuit, the court issued a Rule 16(e) final pretrial order which permitted Petitioner to present alternative recovery theories to the jury and defer election until after those verdicts were returned. That order also determined that Petitioner could seek recovery under New York Labor Law §193, based on the liability phase jury's finding that there had been a "willful failure to pay" Petitioner. (A:51a) Two days later, when Respondent belatedly produced the Deal Files to Petitioner, some of the Exhibit A Transactions were produced, but in a "sanitized" form. (A:22a)

At the damages phase trial, Petitioner presented his evidence on both his breach of contract and *quantum meruit* claims. Respondent cross-examined Petitioner at length on each of the Exhibit A Transactions. Petitioner also submitted evidence showing that, as of the fall of 1994, Respondent was planning on paying Petitioner a discretionary bonus on top of his Percentage Bonus. (JA:241) Each side submitted an expert's report and testimony. (A:8a-9a) Respondent produced its Rule 30(b)(6) witness who also testified about the Exhibit A Transactions. (A:9a) At the close of the damages phase, each side submitted jury instructions and each side made closing arguments to the jury on *both* theories of recovery.

Pursuant to the district court's order, the damages jury returned awards on both breach of contract and *quantum meruit*. That jury also determined the amount that Respondent had willfully failed to pay Petitioner in violation of New York ("NY") Labor Law §198(1-a) (relevant to determining the statutory penalty for willful nonpayment).

The jury's breach of contract verdict consisted of two elements: $1.054 million was earned and due as of the termination date (this was the amount that the jury also determined had been willfully withheld in violation of NY Labor Law), and $1.000 million was awarded for post-termination work performed by Petitioner on behalf of Respondent. The jury's *quantum meruit* verdict measured the value of Petitioner's services to Respondent over the two year period, without regard to the contract, and deducted the amounts previously paid to Petitioner ($1.400 million) to get the net amount, $5.500 million, mentioned in the Second Circuit opinion. (A:9a-10a)

Acting under the district court's order, Petitioner elected the *quantum meruit* award. (A:10a) Thereafter, the district court determined prejudgment interest on the *quantum meruit* award. The issue of attorneys' fees due Petitioner under NY Labor Law §198(1-a) was reserved for a further proceeding.

Respondent then filed damages phase post-trial motions under Rules 50/59 (JA:343-381), again challenging both the breach of contract and *quantum meruit* awards; those motions, discussed in more detail *infra*, were each denied. In denying the Rule 59 motion, the district court found "that the jury's verdict was supported by the great weight of evidence [and that] there were no errors which would otherwise make a new trial necessary." (A:34a) After

correcting a minor arithmetic error, the district court entered an Amended Judgment on August 11, 1998 (A:36a), from which Respondent then appealed.

B. The Proceeding Below.

On appeal, Respondent collaterally attacked many aspects of the district court proceedings. Its single attack on the substantive law applied in the case, was "[q]uantum meruit and other quasi-contractual remedies generally are not available where an express contract exists." (Br. 33-38) The Second Circuit affirmed the district court's opinion on virtually all substantive points except one neither raised by Respondent, nor argued by the parties. Under a subheading "Election of Remedies" under the "Quantum Meruit and Contract Damages" section of the opinion (A:11a-14a), the Second Circuit first determined that New York substantive law governed the action (due to diversity jurisdiction) and that the general rule in New York was that the existence of an express contract ordinarily precludes recovery in *quantum meruit*, subject to exceptions. The Second Circuit then noted, *sua sponte*, that "[t]he parties dispute whether in the circumstances of this case [Petitioner] could elect to rescind the contract . . . after the damages trial." (A:12a) It noted the arguments of each party on the substantive issue raised by Respondent but ignored the Rule 16 pretrial order it had mentioned earlier in its opinion (A:5a).

The Second Circuit determined, without citing any Rule or decisional support, that it did not have to inquire further. Applying the common law doctrine of election of remedy, Petitioner had not "timely rescinded his express contract" and, once the liability phase jury had determined Petitioner had an enforceable contract, "he could not seek to recover under *quantum meruit* in the subsequent damages trial."

(A:13a) While noting that under New York law "a plaintiff may sometimes defer the election of remedies and seek damages from a jury on alternative theories of breach of contract and *quantum meruit*," this was "true only where there is a dispute regarding the *existence, scope or enforceability* of the putative contract." (*Id.*) The Second Circuit observed that it "might be argued that [Petitioner] could have elected to rescind . . . after the liability verdict, [but] no grounds [had been] urged." (*Id.*).

The Second Circuit also observed that because, *inter alia*, Respondent's "counsel conceded [it] at oral argument," Respondent had waived any objection to the amount of contract damages also determined by the jury. (A:14a) The Second Circuit reviewed the other issues raised by Respondent, found none of them required reversal except one minor one - the date from which prejudgment interest should be measured. (A:17a) The Second Circuit, concluded that "in light of our disposition of this appeal, the only issues that remain for remand are (1) the amount of prejudgment interest and (2) the amount of attorneys' fees [Petitioner] is entitled to pursuant to §198(1-a) of the [NY] Labor Law, a question not litigated on this appeal." (A:30a-31a)

The Second Circuit, therefore, acting solely on the basis of the common law procedural doctrine of election of remedies, reversed the *quantum meruit* award Petitioner had elected pursuant to the district court's order, and "remanded for entry of judgment in favor of [Petitioner] on his contract damages." (A:31a)

In Petitioner's petition for rehearing, he argued forcefully that at the *liability phase pretrial conference, after* Petitioner's counsel had specifically outlined that both breach of contract and *quantum meruit* alternatives were

reserved for the damages phase, Respondent's trial counsel replied "Fine." (JA:50-51) That statement to Petitioner's trial counsel *and* to the district court with regard to the issues to be presented at the liability phase operated as an agreement or express waiver of any right regarding election between contract and *quantum meruit* damages under Rule 16(d).

The statement, Petitioner argued, occurred *one week before* the liability phase jury made its determinations, and therefore the critical point in time from the Second Circuit's perspective, ("[once]the liability phase jury determined that Reilly had an enforceable contract,") was covered by that waiver. (A:13a) (Virtually identical pretrial conduct by defense counsel and the identical word - "Fine" - are currently at issue before this Court in *New York v. Hill*, 92 NY2d 406 (1998), *cert. granted*, 119 SCt 1754 (1999)(No. 98-1299), argued November 2, 1999, albeit in the context of a criminal trial involving the application of the speedy trial provisions of the Interstate Agreement on Detainers.)

Petitioner also pointed out that the district court's Rule 16(c) pretrial order issued *before* the damages phase of the trial, (A:42a-44a), expressly permitted Petitioner to elect post-verdict, that Respondent had engaged in conduct inconsistent with the Second Circuit's spontaneous conclusion about the election of remedies issue, and that the Second Circuit had ruled on this aspect of the case without briefing or argument by either party. Petitioner requested the opportunity for further briefing solely on the election of remedies issue. The Second Circuit denied rehearing without explanation on July 29, 1999. (A:45a-46a)

REASONS FOR GRANTING THE WRIT

I. THE ORDER BELOW LACKS RULE 50(D) AUTHORITY UNDER PRIOR RULINGS LIMITING FEDERAL APPELLATE JUDGMENTS N.O.V.

Federal appellate courts' authority to order district courts to act is not constitutionally mandated; it is derived from statute and rules. 28 USC §2702(a). The Rules literally and technically do not apply to the courts of appeals, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 US 826, 832 (1989); *International Union, UAW Local 283 v. Scofield*, 382 US 205, 216 & n.10. (1965). *See also* Rule 1. Likewise, the Federal Rules of Appellate Procedure ("Appellate Rule(s)") apply to the federal appellate courts, but not in the district courts. By way of illustration, the Rules and the Appellate Rules represent the two sides of an isosceles or equilateral triangle. The base represents the federal courts' constitutional and statutory authority. The apex is this Court.

The federal appellate courts' real power is derived from Appellate Rule 41, giving them the ability to issue mandates to the district courts. But only district courts have the ability to make, enter and enforce judgments. *Tyler v. Magwire*, 84 US 253 (17 Wall. 253) (1872) (appellate power is exercised over subordinate court's proceedings, not over judgments or decrees). The appellate courts' power to effect judgments, therefore, is derivative, since they can only direct district courts to take or not take certain actions. Normally this process works

fine both in principle and practice. There are occasional breakdowns.[3]

Federal appellate courts have authority to order judgments *n.o.v.* under Rule 50. (The term "*n.o.v.*" while not currently used in Rule 50 since 1991, is adopted throughout this petition because of its usage in prior, relevant decisions of this Court and because it more appropriately reflects the actions taken by the Second Circuit.) Since the district court denied both Respondent's Rule50(b) and Rule 59 alternative post-verdict motions (A:33a-34a), Rule 50(d) would have applied in this instance.

Prior to the addition of subsections (c) and (d) in 1963, the Rules and this Court authorized appellate courts to act under Rule 50(b) when ordering judgments *n.o.v.* This Court's Rule 50(b) cases factually subdivide into two major and one minor groups: major group cases comprise situations where either (a) the district court or the appellate court found there was insufficient evidence to support the winner's verdict; or (b) the verdict loser failed to strictly comply with Rule 50(b)'s procedural requirements.

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[3] This case does not involve a federal appellate court applying a state statutes governing the size of a jury verdict. Unlike the New York diversity tort action, *Gasperini v. Center for Humanities, Inc.*, 518 US 415 (1996), no itemized verdict is obtained in a contract action under NY CPLR 4111 and, accordingly, no review is triggered under NY CPLR 5001. Nor are the public policy and due process considerations present in punitive damages awards situations, *see e.g. BMW of North America, Inc. v. Gore*, 517 US 559 (1996), at issue here. As presented to the damages phase jury, this was an action for compensatory damages only, based on contract breach and *quantum meruit* alternative recoveries.

The minor group consists of situations where, in considering the claims, and in fairness to the parties, this Court concluded that there is no basis for recovery. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 490 (1977); *United States v. Generes*, 405 US 93, 106 (1972). The minor group cases are clearly not applicable to Petitioner.

"Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about. . . motions for judgments [*n.o.v.*]. State procedure was no longer to control federal courts as it had . . . . Federal courts were to be guided by this new rule, which provided its *own exclusive procedural program*." *Johnson v. New York, NH & H R Co.*, 344 US 48, 52 (1952).

Montgomery Ward & Co. v. Duncan, 311 US 243 (1940) stated the standard applicable to the sufficiency of evidence group: "[Under Rule 50(b), t]he motion for judgment [*n.o.v.*] cannot be granted unless, as matter of law, the opponent of the movant *failed to make a case* and, therefore, a verdict in movant's favor should have been directed." 311 US at 251. *Neely* falls into this group, *see Hetzel*, 523 US at ___, 118 SCt at 1212, but its significance lies principally in that it was decided after 1963 under Rule 50(d). Only Rule 50(d) could have applied to Petitioner. "[A]s the Advisory Committee explained, these 1963 amendments [adding subsections (c) and (d)] were not intended *to alter the effects of a jury verdict* or the scope of appellate review." *Neely*, 386 US at 324.

In contrast, where "[t]he respondent failed to submit a motion for judgment [*n.o.v.*] to the trial judge . . . we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had

permitted to stand." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217-18 (1947). *See also Globe Liquor Co. v. San Roman*, 332 US 571, 572 (1948)(did not move under Rule 50(b)); *Weade v. Dichmann, Wright & Pugh*, 337 US 801 (1949); *Fountain v. Filson*, 336 US 681 (1949)(same standard applies under Rule 56).

Petitioner's case does not fall into either major group as it did not warrant a judgment *n.o.v.* at all.

Irrespective of how Petitioner's case is categorized, he submits that, under this Court's prior holdings and the facts here, Rule 50(d) is and was legally and technically the only basis for the Second Circuit's judgment *n.o.v.* order. Petitioner concedes that a federal appellate court might, in extraordinary circumstances not present here, have authority to act outside the scope of Rule 50, and order a judgment *n.o.v.*, so long as it does not involve a "matter in abatement" within the meaning of 28 USC §2105, and so long as it is consistent with the scope of 28 USC §2106. *See also* Appellate Rule 2 ("[o]n its own motion . . . a court of appeals may - to expedite its decision or for other good cause - suspend any provision of these rules in a particular case and order proceedings as it directs"). Even assuming for a *very* brief moment that this case - a private commercial litigation dispute involving compensatory damages only - represents such an extraordinary circumstance, the Second Circuit made neither a departure announcement nor a statutory authority articulation here. (A:31a)

While the Second Circuit might depart from its own rules under certain circumstances, it was not free to order a judgment *n.o.v.*, altering the jury award, which requires that the district court violate the Rules. This Court has stated district courts are required to apply the Rules.

Hanna v. Plumer, 380 US 460, 471 (1965). Under the procedural posture of this case, therefore, for the Second Circuit to have reversed the judgment *at all*, let alone order a judgment *n.o.v.*, it needed to conclude that on the facts initially determined by the liability phase jury (A:50a), as reviewed by the district court for evidentiary support and error, and as subsequently reduced to damages by the second jury, there was no dispute about the "*existence, scope or enforceability*" of the agreement as a substantive matter under New York law, since such a dispute permits alternative claims. (A:13a)

A. The "existence, scope or enforceability" dispute.

On the record here, it would be extraordinarily difficult to conclude there was no dispute about the "*existence, scope or enforceability*" of the agreement. The Second Circuit, Petitioner submits, did not make that determination ("We need not decide these academic issues interesting as they may be") (A13a), and further submits that such a determination would be difficult to make without calling the constitutional safeguards present in the Seventh Amendment into play.

When the two separate jury verdicts are combined the facts are that, of the $2.054 million of contract damages Petitioner also plead and proved, and Respondent has *now conceded* were due, *over half* had been subject to a "willful failure" on Respondent's part to pay "monies owed to [Petitioner] that he had earned prior to his termination." The more informative calculation is to take *all* the accrued but unpaid monies earned by Petitioner up to the time of his termination (A:16a) and divide it by the amount the juries found willfully withheld (*Id.*). The answer is 100%.

The district court, relying on the juries' findings and applying New York law, concluded that those activities constituted a violation of NY Labor Law §198(1-a)(providing for a 25% liquidated damages penalty on the amount so willfully withheld *plus* attorneys' fees). (A:43a) The Second Circuit upheld that aspect of the case (A:14a-16a). The high statutorily mandated liquidated damages provision alone ($263,500) gives this Court the concept of how strongly New York views unfavorably such activity. Under the often cited case of *Erie R. Co. v. Tompkins*, 304 US 64 (1938)(hereinafter "*Erie*"), those statutory outcome determinative principles should have been and were imported into the district court's pretrial order which expressly permitted Petitioner, as a matter of substantive New York law, to plead and prove alternative measures of damages. (A:42a-43a)

Ignore the amounts involved. Leave aside for the moment the discovery and court order violations (A:20a-23a; A:24a-25a; A:26a) present here (instructive as to Respondent's attitude toward its contract obligations to Petitioner). Disregard the willful violation of an outcome determinative New York statute regarding payment of monies due to an employee. Petitioner submits that, on a purely commercial basis, when *over half or all* the monies already earned and due to a non-breaching party under an agreement requiring payment for services are "willfully withheld" by the breaching party, there is, *as a matter of law*, a dispute regarding the *existence, scope or enforceability* of the agreement. (A:13a) Since this issue was not briefed or argued, and the rehearing petition was denied without explanation (A:45a), there is no rationale with which to argue. Petitioner suggests, however, that the Second Circuit felt constrained in that way, did not make "willfully withheld" calculations, or ignored its own NY Labor Law §198(1-a) finding to reach the wrong result.

For the Second Circuit to issue a *n.o.v.* order, however, it needed to act under Rule 50(d), which requires an appealed from 50(b) motion *qua* motion. That was not present here.

B. Rule 50(d) was not and could not be triggered.

While district courts can act *sua sponte* under Rule 50(a)(1) and direct a judgment *n.o.v.*, the plain language of Rule 50(d) requires an appealed from Rule 50(b) motion denial as an appellate *n.o.v.* triggering mechanism, since Rule 50(d) authority only operates "[i]f *the motion* for judgment [*n.o.v.*] is denied." The Rule's terms and the Advisory Committee Notes are clear on this point. *Neely* confirms this Court's limitation on appellate judgments *n.o.v.* They are authorized only "after reversing the denial of a defendant's Rule 50(b) motion for judgment [*n.o.v.*]." *Neely*, 386 US at 321-22.

The Advisory Committee Notes also state, however, that Rule 50(d) "does not attempt a regulation of all aspects of procedure . . . since the problems have not been fully canvassed." To the extent there is a Rule 50(d) "gap," because this Court has not yet defined the triggering authority necessary for a Rule 50(d) action, it should be filled. In this one fundamentally important area of federal jurisprudence - the ability of federal appellate courts to act *sua sponte* or in the absence of appealed from Rule 50(b) motions, set aside *jury verdicts*, and order judgments *n.o.v.* - there should be no gaps in this Court's articulation of what is required. The triggering standards should be crystal clear. As evidenced by this case, the standards are not clear at the moment.

C. **Federal appellate court judgment n.o.v. authority.**

Even though Respondent did not appeal from the Rule 50(b) motion's denial, it did file one. Assuming, *arguendo*, some Rule 50(d) authority existed for the Second Circuit's *n.o.v.* action, this case still falls into one of the groups of cases this Court has held do not permit an appellate *n.o.v.* *Hetzel* expressly distinguished and limited *Neely* to "situations where the [c]ourt of [a]ppeals had held that the *evidence was insufficient* to support a finding of liability, [noting that] *Neely* did not involve overturning an award of damages where the evidence was found sufficient to support a finding of liability." *Hetzel*, 523 US at ___, 118 SCt at 1212. In the present case, the district court found "[there was] sufficient evidence from which the jury could have returned its verdict . . . [t]herefore, [Respondent's Rule 50(b)] motion must be denied." (A:33a) In denying the alternative Rule 59 motion, it found "the jury's verdict was supported by the great weight of evidence." (A:34a) Respondent did not appeal based on sufficiency of evidence.

Under *Neely's* other Rule 50(d) limitation, the appellate court, before "ordering judgment *n.o.v.* [must re-determine whether] the verdict loser has *failed strictly to comply* with the *procedural requirements* of Rule 50(b), or where the record reveals a *new* trial issue which has not been resolved." *Neely*, 386 US at 325. Assuming that the earlier *Neely* limitation is not already dispositive, Petitioner submits that Respondent could never pass the second one because it fails the Rule 50(b) "no new grounds" test.

Respondent's initial and renewed Rule 50(a) pre-verdict motions, covered *only one ground* - sufficiency of proof. "Your Honor, what I am doing is I am pointing out that there is a total *failure to make proof* with regard to the

quantum meruit claim. That is something that has occurred during the course of the presentation of [Petitioner's direct] case" (tr. at 1107-08; tr. at 1246.)

On its post trial Rule 50(b) motion, Respondent made an *entirely new set* of legal and evidentiary arguments to the district court. (JA:343-381) Respondent's sufficiency of evidence challenge was dropped. Instead, the district court was presented with other previously alleged errors, which caused the court to sanction Respondent. (A:34a) Respondent also tried to reargue the applicable substantive law standard. But that challenge had not been made in either the initial or renewed Rule 50(a) motions. *See generally* Wright & Miller, *Federal Practice And Procedure: Civil 2d* §2537 (hereinafter "Wright & Miller")("no new grounds" requirement strictly enforced). The district court recognized: "Th[is] Court has already expressly rejected the legal basis of the [applicability of *quantum meruit*] in its [pretrial order]. Accordingly, the only issue remaining . . . is whether there was sufficient evidence [to support] the verdict. The Court finds that there was." (A:33a) Respondent fails "no new grounds."

Under a more liberal construction of "no new grounds." Respondent may have had one slender thread remaining under Rule 50(b) with which to urge the Second Circuit to reverse the district court and obtain a judgment *n.o.v.* Petitioner submits that Respondent cut that thread on appeal. Even if Respondent could satisfy this Court that somehow, without ever invoking Rule 50 or sufficiency of the evidence, it had preserved an ability to obtain a judgment *n.o.v.*, it cannot ever pass the second *Neely* limitation. Why? Because the relief the Second Circuit granted here - judgment *n.o.v.* in the amount Respondent only conceded it was liable for on appeal could never represent anything but a Rule 50(b) "new ground." The

relief Respondent obtained was at the Second Circuit. It was only there that Respondent conceded liability. To this extent, therefore, Respondent's *conceded liability* is always a new ground, since it occurred only at the appellate level. The act of concession was self-destruction for Respondent under Rule 50(b) and therefore Rule 50(d) could never have been triggered.

The Second Circuit *n.o.v.* order lacks authority.

II. THE OPINION BELOW CONFLICTS WITH THIS COURT'S RULINGS AND OTHER CIRCUIT DECISIONS REGARDING PRETRIAL ORDERS.

The Second Circuit noted, but ignored, the district court's damages phase Rule 16(e) pretrial order and its effect on the proceeding. (A:42a-44a) The pretrial order was not issued in a complete factual and legal vacuum. It was based on the liability phase jury findings (A:50a), pretrial memoranda and submissions (JA:78-141), and oral argument from both sides (JA:157-179). Respondent never sought to modify the pretrial order, and did not appeal from it.

The Second Circuit's ignoring Rule 16(e) destroys litigants' ability to determine trial issues. This aspect of the decision introduces uncertainty into the Rules, which are designed and expressly written to shape and define trial issues based on notice pleading and discovery. *Conley v. Gibson*, 355 US 41, 47-48 & n. 9 (1957).

When a district court issues a pretrial order under Rule 16 which, *inter alia*, clearly determines that, under state substantive law, a claimant is entitled to seek inconsistent remedies and make an election between them following the jury's determination; the case is tried, argued to the jury

with that pretrial order either at the time issued or on appeal, under *United States v. Hougham*, 364 US 310 (1960) the Second Circuit's determination that there was an earlier waiver of Petitioner's right to seek inconsistent remedies was clearly wrong. As stated by that Court, the election of remedies issue "most certainly was not waived and must here be determined." 364 US at 316.

The Second Circuit is also in conflict with several other circuits with regard to the effects of Rule 16. *See Smith v. Washington Sheraton Corporation*, 135 F3d 779 (DC Cir. 1998)(and the Seventh and Ninth Circuit cases cited there):

> [Under *Hougham*], a Rule 16 pretrial order conclusively establish[es] the issues of fact and law in the case. . . [but] the defendants in this case never sought [a pretrial order] modification [and, therefore, plaintiff] was entitled to rely on . . . the pretrial order to inform her of "precisely what [was] in controversy. *Id.* at 784.

III. THE OPINION BELOW CONFLICTS WITH OTHER CIRCUITS' RULINGS ON RULE 8, WHICH ABOLISHED ELECTION OF REMEDIES.

Under the express terms of Rule 8(a) and (e)(2), the Advisory Committee Notes, the overwhelming authority of the circuit courts of appeals, all as reflected in the standard legal texts and treatises, the common law doctrine of election of remedies - the sole legal basis for the Second Circuit's judgment *n.o.v.* order - has been abolished in the federal courts. The substantive corollary doctrine, designed to prevent duplicative recovery, was fully met in this case.

In a diversity action under *Erie* the procedural laws applicable are the Rules. *Hanna v. Plumer, supra* 380 US

at 465. The district court applied them during the course of the litigation. The Second Circuit has *n.o.v.* order authority only under Rule 50 - not the Appellate Rules. Accordingly, the Second Circuit was "bound" by the Rules insofar as it could not order the district court to enter a judgment *n.o.v.* apart from Rule 50. Even under Rule 50, it cannot properly order the district court to violate Rule 8.

A. Rule 8 Now Governs Presentation Of Alternative Claims In Federal Courts.

This Court has long shown little regard for the common law procedural election of remedies doctrine. "At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended." *Friedenchsen v. Renard*, 247 US 207, 213 (1918).

As Justice Brandeis noted:

> The doctrine of election of remedies is not a rule of substantive law. It is a *rule of procedure* or judicial administration. It is technical, and, as applied in some jurisdictions, has often sacrificed substantial right to supposed legal consistency. The doctrine has often been invoked in this court, but never before successfully.

United States v. Oregon Lumber Co., 260 US 290, 304 (1922)(Justice Brandeis, with Chief Justice Taft, and Justice Holmes, dissenting).

After Rule 8 was adopted, this Court noticed its impact. *See United States v. Kales*, 314 US 186, 196 (1941): "a taxpayer, in his presentation of an informal tax refund claim, should be in no less favorable position than the

plaintiff in a suit at law who is *permitted to plead his cause of action in the alternative. See Rule 8(e).*" More recently, this Court noted a lack of symmetry between Rule 8(e)(2) and the Criminal Procedure Rules, which lack a similar provision. *See Matthews v. United States*, 485 US 58, 64 (1988).

More generally, this Court has zealously guarded the consistency of Rule 8's application. *See Baldwin County Welcome Center v. Brown*, 466 US 147, 151 (1984)(can not give Title VII actions a special status under Rule 8); *Leatherman v. Tarrant County NICU*, 507 US 163, 164 (1993)(federal courts can not apply Rule 8 "heightened pleading standard" in civil rights cases alleging municipal liability under 42 USC §1983). *See also Crawford-El v. Britton*, 523 US 574 (1998)(heightened burden of proof can not be required under the Rules for §1983 claimants alleging constitutional violations by public officials).

B. Rule 8 Abolished The Common Law Doctrine.

In a diversity action under *Erie*, Rule 8 governs pleading matters. Rule 8's requirements must be met. The pleading requirements apply for defensive purposes, *see e.g. Little v. Texaco, Inc.*, 456 F2d 219, 220 (10th Cir. 1972); and offensive purposes, *see e.g. Breeding v. Massey*, 378 F2d 171, 178 (8th Cir. 1967)("[In a diversity action, under Federal Rules 8(e) and 8(a)], the right of a plaintiff to try his case on alternate theories has uniformly been upheld and plaintiff cannot be required to elect upon which theory to proceed"). The right to argue in the alternative and seek inconsistent relief is not altered by the fact that the case has been tried. *Koedding v. Slaughter*, 481 F Supp 1233, 1237 (ED Mo. 1979), *aff'd*, 634 F2d 1095 (8th Cir. 1980). *See also In re King Enterprises*, 678 F2d 73, 76-77 (8th Cir. 1982).

The principles Petitioner outlines have long been embodied in the standard treatises: Wright & Miller §1044 at 146 ("rules that put plaintiffs to an election of remedies no longer applicable [due to] Rule 8(e)(2)"); Wright & Miller §1235 at 274 ("consistency in pleading is not required by the federal rules, [and] a party may claim alternatively on an express contract and on an implied contract"); Wright & Miller §1283 ("[Rule 8(e)(2) abrogates the so called 'theory of the pleadings' doctrine which required a plaintiff to seek recovery on a single theory, and only permitted relief to be granted on the particular theory adopted by the pleader"); 35A *Corpus Juris Secundum*, Federal Civil Procedure § 398 (1960)("The common-law doctrine of election of remedies has no application under the Federal Rules of Civil Procedure"); *See also* 2A Moore's Federal Practice ¶8.32, at 8-214-15 (2d ed. 1994).

In almost all circuits, accordingly, Petitioner could go to the jury on his alternative claims.

C. A Split Of Authority Exists Between The Circuits.

In diversity cases involving the *offensive* use of Rule 8(e)(2) - submission of a case on alternative claims for relief - Second Circuit case law is inconsistent with the other circuits. It long ago acknowledged that Rule 8(e)(2) applies in diversity cases in a *defensive* context. *Fidelity & Deposit Co. of Maryland v. Krout*, 146 F2d 531, 532 (2d Cir. 1945). *See also MacFarlane v. Grasso*, 696 F2d 217, 224-25 (2d Cir. 1982)(may not construe one claim as an admission against another, inconsistent claim). Without citing Rule 8(e)(2), the Second Circuit has permitted alternative remedy pleading and submission of a case in a RICO context. *Riverwoods Chappaqua v. Marine Midland*

Bank, NA, 30 F3d 339, 343 (2d Cir. 1994), and it has expressly acknowledged the rule in a civil rights context, *Henry v. Daytop Village, Inc.*, 42 F3d 89, 95 & n.2 (2d Cir. 1994)("[t]he flexibility afforded by Rule 8(e)(2) is especially appropriate in civil rights cases").

The Second Circuit, however, has not cited Rule 8(e)(2) for the proposition that in offensive contexts in diversity actions a claimant may pursue alternative remedies to their logical conclusion: realization of a jury award.

In the Second Circuit, it is quite clear that a party may *commence* an action seeking both breach of contract and *quantum meruit* damages in the alternative. Under New York law, Petitioner was not barred from pleading both claims. *See e.g., Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F3d 660 (2d Cir. 1996); *Grappo v. Alitalia Linee Aeree Italiane SpA*, 56 F3d 427 (2d Cir. 1995).

In both *Rule v. Brine, Inc.*, 85 F3d 1002, 1011 (2d Cir. 1996) and *Marcella v. ARP Films, Inc.*, 778 F2d 112, 116-17 (2d Cir. 1985), however, the Second Circuit cites New York case law, not Rule 8, for the proposition that a diversity jurisdiction plaintiff may submit inconsistent claims to a jury. (Both cases involved breach of contract and *quantum meruit* claims.) The opinion does not say why these outcome determinative principles were not used, since New York rules likewise abolish the doctrine.[4]

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[4] New York's civil procedure scheme is modeled on the Rules. *See* NYCPLR 3014 ("Separate [claims] may be stated regardless of consistency [and] alternatively or hypothetically") *and* CPLR 3017(a) ("Relief in the alternative or of several types may be demanded"). New York case law limits the doctrine. *Strong v. Reeves*, 114 N.Y.S.2d 97, 101 (App. Div., 3d Dep't 1952), *aff'd*,

In *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F2d 1363, 1371-72 (7th Cir. 1990), now Chief Judge Posner laid out the methodology under which the election of remedies doctrine is applied in diversity actions. That opinion discussed several aspects of the doctrine. First, it notes election is a common law procedural doctrine. With respect to its application, that circuit held that Rule 8(e)(2) "expressly abolished election of remedies" in "all federal civil litigation, even if the issue being litigated is one of state law." *Id.* at 1371. The doctrine's substantive corollary, really "part of the law of remedies rather than procedural law" simply "seeks to prevent double recovery." *Id.* Since "[i]t would be unreasonable to make [a claimant] choose between the two forms of damages before trial and verdict," *Id.*, the "important point to the [substantive corollary to the doctrine] is that it is *inapplicable unless and until the jury returns a verdict that provides duplicative recovery.*" *Id.* at 1372.

The Seventh Circuit's consistent articulation of Rule 8(e)(2)'s applicability in diversity cases represents a single, uniform, predictable standard which should be adopted by this Court. The Seventh Circuit has consistently applied the *Olympia Hotels* interpretation. *See, e.g. American Int'l Adjustment Co. v. Galvin*, 86 F3d 1455, 1460 (7th Cir.

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306 NY 86 (1953). Siegel, Practice Commentary to CPLR 3002 ("Siegel") discusses the current view of the election doctrine:

> The case can even go to a jury . . . relative to two inconsistent grounds. . . . [i]f . . . the fact-findings make possible [two inconsistent awards], the plaintiff would now have to elect, before being awarded judgment . . . *[t]hus, even with mutually exclusive remedies, the election can literally be postponed until judgment day.* Siegel C3002:14.

1996) ("[Rule] 8(e)(2) abolished the doctrine of election of remedies in federal court")(citing *Olympia Hotels); Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F3d 388, 390 (7th Cir. 1995)("It is not a revival of the doctrine of election of remedies, which survives only as a bar to double recovery") (citing *Olympia Hotels*).

See also American Int'l Adjustment Co., 86 F3d at 1466 (Posner, CJ, dissenting) ("the motion [to force an election of remedies] was bound to fail because the doctrine of election of remedies has, since 1938, been defunct in the federal courts [per Rules] 8(a), (e)(2) and Advisory Committee Notes"). Adoption of this standard alone would necessitate reversal of the Second Circuit's decision.

Other circuits are in accord with the Seventh Circuit's application of Rule 8(e)(2) and the abolition of the doctrine in federal courts:

o *Scott v. District of Columbia*, 101 F3d 748, 753 (DC Cir. 1996), *cert. denied*, 520 US 1231 (1997).

o *In re Gens*, 112 F3d 569, 573 & n.3 (1st Cir. 1997).

o *Pulliam v. Gulf Lumber Co.*, 312 F2d 505, 507 (5th Cir. 1963).

o *Whitt v. E. I. DuPont de Nemours & Co.*, 461 F2d 1152, 1154 (6th Cir. 1972); *Grogan v. Garner*, 806 F.2d 829, 838 (8th Cir. 1986); *Breeding v. Massey*, *supra*.

o *McCalden v. California Library Assn.* 955 F2d 1214, 1219 (9th Cir. 1990), *cert. denied*, 504 US 957 (1992); *Molsbergen v. United States*, 757 F2d 1016, 1018-19 (9th Cir.), *cert. dismissed*, 473 US 934 (1985).

o *Bernstein v. United States*, 256 F2d 697, 706 (10th Cir. 1958), *cert. dismissed per stipulation*, 358 US 924 (1959); *Campbell v. Barnett*, 351 F2d 342 (10th Cir. 1965).

o *Allstate Insurance Co. v. James*, 779 F3d 1536, 1541 (11th Cir. 1986); *Brookhaven Landscaping & Grading Co. v. J F Barton Contracting Co.*, 676 F2d 516, 523 (11th Cir. 1982).

Assuming, *arguendo*, there is a small place left for the doctrine within the federal system, its application involves district court discretion. The district court should not normally apply the doctrine, for example, in trials that have been bifurcated under Rule 42(b). "[T]he election of remedies doctrine does not justify placing plaintiff under a greater handicap because of the bifurcated nature of the procedures under which . . . [he] must seek relief." *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 415 (Fed. Cir. 1988).

The district court should not apply the doctrine unless the electing party has full knowledge of his choices. *See In re Mann Farms, Inc.*, 917 F2d 1210, 1213 (9th Cir. 1990); *Allstate Insurance Co. v. James, supra*, 779 F2d at 1541; *Berger v. State Farm Mutual Auto. Ins. Co.*, 291 F2d 666, 667 (10th Cir. 1961). These cases suggest that in bifurcated trial situations where discovery on inconsistent damage theories has been deferred until a later stage of the proceeding (A:3a) it is inappropriate to apply the doctrine, if at all, until full discovery has been obtained by the claiming party. In Petitioner's case, of course, nothing resembling full discovery was ever obtained. (A:22a)

Finally, in a similar context to the one here, this Court has recently recognized "that [an] appellate review of a sanctions order can[not] remain completely separate from the merits [of

the case, and, accordingly] a ... sanctions order often will be inextricably intertwined with the merits of the action." *Cuningham v. Hamilton County, Ohio*, ___ US ___, ___, 119 SCt 1915, 1920 (1999)(Rule 11 sanction).

The district court's sanctions order issued against Respondent - an adverse inference instruction to the damages phase jury - was approved on appeal, (A:21a-23a), and had implicit and explicit elements. The implicit elements were (1) there clearly was a dispute regarding the *existence, scope or enforceability* of the contract, and (2) that factual predicate qualified Petitioner as having the ability under New York law to present both breach of contract and *quantum meruit* remedy theories to the jury. The district court explicitly noted that, because of the adverse inference instruction, Petitioner was not unduly harmed in presentation of the *quantum meruit* claim. The district court thus "inextricably linked the sanction with the merits of the action." *Cunningham*, 119 SCt at 1920. But the Second Circuit decision eviscerates that linkage. Petitioner submits that on this basis alone, the Second Circuit erred in not reviewing the *quantum meruit* award on an abuse of discretion standard.

This Court has repeatedly and recently emphasized the discretion that district court's have in determining a variety of important civil litigation threshold and trial managment issues. *See e.g., Ruhrgas AG v. Marathon Oil Company*, ___ US ___, 119 SCt 1563 (1999) (personal versus subject matter jurisdiction); *Kumho Tire Co. v. Carmichael*, 526 US 137 (1999)(scientific evidence); *United States v. Degen*, 517 US 820 (1996)(civil forfeiture in parallel with criminal case); *Swint v. Chambers County Comm'n*, 514 US 35 (1995)(certification of interlocutory appeal issues); *Wilton v. Steven Falls Co.*, 515 US 277 (1995)(discretion to entertain declaratory judgments). All of these matters, we submit, raised far greater issues than the district court's

discretion to manage the timing and sanctions issues associated with alternative claims presentation within a bifurcated trial.

This aspect of the Second Circuit's decision is not easily categorized. It represents neither a proper interpretation of federal pleading rules nor of substantive state law. It ignores Rule 16(e) and state outcome determinative principles. Its case principle may represent the "heightened pleading standard" which this Court has disfavored in civil actions. *Leatherman*, 507 US at 168. It is not good law.

CONCLUSION

This case presents a question of exceptional importance - the authority under which federal appellate courts can change or nullify jury verdicts for the payment of compensatory damages - the "bread and butter" of the federal court system. If left unchanged, the Second Circuit's judgment also impinges on the discretion of district courts to manage the litigation process through Rule 16, and the rights of claimants to plead under Rule 8. If the decision is allowed to stand, Petitioner will have been denied a jury verdict that he plead, proved, and elected as permitted under the Federal Rules of Civil Procedure.

Accordingly, Petitioner prays this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

Michael T. Reilly
Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term 1998

(Argued: March 18, 1999 Decided: JUN 17, 1999)

Docket No. 98-7968(L); 98-9222(XAP)

MICHAEL T. REILLY,

Plaintiff-Appellee-Cross Appellant,

- v. -

NATWEST MARKETS GROUP INC., and NATWEST MARKETS, a division of National Westminster Bank, PLC,

Defendants-Appellants-Cross Appellees.

Before: McLAUGHLIN, CALABRESI, GIBSON,* *Circuit Judges*

NatWest Markets Group Incorporated and NatWest Markets ("NatWest") appeal from a judgment of the United States District Court for the Southern District of New York (Conti, J. visiting from the United States District Court for the Northern District of California), in favor of Michael T. Reilly in the amount of $7,124,750. Reilly cross-appeals the district court's refusal to grant him a default judgment and the dismissal of his defamation claims.

* The Honorable John R. Gibson, of the United States Court of Appeals for the Eighth Circuit, sitting by designation. [2]

AFFIRMED in part, REVERSED in part, and REMANDED.

RICHARD L. CLAMAN, Stempel Bennet Claman & Hochberg, P.C., New York, New York, for Plaintiff-Appellee-Cross Appellant.

DOUGLAS D. BROADWATER, Cravath, Swaine & Moore, New York, New York (Allen K. Rostron of counsel); Jeffrey L. Liddle, Liddle &Robinson, New York, New York, for Defendants-Appellants-Cross-Appellees.

McLAUGHLIN, Circuit Judge:

BACKGROUND

In January 1994, NatWest, an investment bank, hired Michael T. Reilly to help develop its fledgling underwriting business. The parties entered into an express contract guaranteeing Reilly's employment for 1994 and 1995 under the following terms. For 1994, Reilly would receive a base salary of $200,000 plus a bonus that would raise his "total compensation" to 33% of the first $4.5 million of gross revenues derived by NatWest from deals on which he worked (the "Percentage Bonus"), but that in no case would be less than $1 million. For 1995, Reilly's salary was to be set by the Percentage Bonus formula, but without the $1 million floor. In both years, Reilly could also receive an extra bonus payable "at NatWest's discretion." Excluding that discretionary bonus, the

maximum Reilly could receive each year was $1.485 million, or a total of $2.97 million for both years.

In August 1995, NatWest fired Reilly. Despite his termination, he continued to work as a consultant for the rest of the year. NatWest paid Reilly a total of $1.4 million for 1994 and 1995.

In January 1996, Reilly sued in the United States District [3] Court for the Southern District of New York (Sprizzo, J.) seeking damages for: (1) breach of contract; (2) *quantum meruit*; (3) violation of New York's Labor Law; and (4) defamation. Judge Sprizzo bifurcated the case, the first trial to resolve liability issues and the second to determine damages. He also ordered that "all parties notify all other parties of record five business days prior to serving any third party subpoenas." The case was then assigned to Senior District Judge Samuel J. Conti, visiting from the Northern District of California. Prior to the liability trial, Judge Conti dismissed Reilly's claim for defamation.

In June 1997, the liability trial was held to determine whether NatWest breached Reilly's contract and violated New York's Labor Law. The jury determined that NatWest had: (1) terminated Reilly without cause in breach of his contract; and (2) willfully withheld wages owed to Reilly in violation of New York's Labor Law. NatWest does not appeal those determinations.

Discovery, supervised by Judge Sprizzo, then commenced on damages issues, including *quantum meruit*. Judge Sprizzo ordered the parties to complete all discovery by March 31, 1998. In September 1997, Reilly requested that NatWest produce for deposition those of its representatives who were familiar with the extent and

value of the work that he had performed. Reilly made this request pursuant to Fed. R. Civ. P. 30(b)(6), which requires a corporation to respond to a notice for a deposition on a particular subject matter by providing such "persons" as are knowledgeable about the subject matter. NatWest produced only Stephen Sayre, a NatWest investment [4] banker. Although Reilly complained to NatWest that there were a number of "key areas" where Sayre lacked sufficient knowledge to provide complete answers to his inquiries, NatWest did not produce any additional witnesses.

In September 1997, Reilly also requested all documents concerning his activities while at NatWest. In response, NatWest produced some 15 boxes of documents. After reviewing those documents, Reilly notified NatWest that his personal deal files (the "Deal Files") were missing. Reilly claimed that those files were important because they showed his involvement in various transactions that NatWest had never compensated him for. NatWest refused to produce the Deal Files, insisting it did not have them.

In April 1998, Judge Conti reassumed control of the case, and set Monday, May 11th as the trial date. On April 27th, NatWest submitted a witness list naming five witnesses who had not been produced in response to Reilly's Rule 30(b)(6) notice. Among these five were three witnesses, including Joseph Adams, who NatWest announced would testify regarding the value of Reilly's services. On May 5th, Reilly made a motion on "preclusion issues" which, inter alia, sought: (1) preclusion of those witnesses NatWest had failed to produce in response to his Rule 30(b)(6) notice; and (2) an adverse inference jury instruction based on NatWest's failure to produce the Deal Files. The same day, while NatWest filed a pretrial

memorandum of its own, it failed to address either of Reilly's contentions.

On Tuesday May 5th, Judge Conti held a pre-trial conference to [5] discuss Reilly's claims for contract and *quantum meruit* damages. Judge Conti ruled that Reilly could go to the jury on both his contract and *quantum meruit* claims, and that he could recover damages under either claim for both years of his employment. Also discussed at the May 5th conference were the preclusion and adverse inference measures sought by Reilly. Though Judge Conti reserved decision on Reilly's requests for those measures, during the hearing NatWest's lawyer - Jeffrey L. Liddle - was given an opportunity to, and did, argue against them. On the question of whether an adverse inference instruction was warranted, Liddle described Reilly's claimed need for the Deal Files as "bogus," insisting that every relevant document "that is in our possession . . . has been produced."

On Thursday, May 7th, NatWest informed Reilly that it had suddenly found the Deal Files. A NatWest investment banker submitted an affidavit stating that he discovered the Deal Files some seven linear feet of documents - while getting a cup of coffee in a 10 x 20 foot kitchen adjacent to Reilly's old office. The Deal Files were delivered to Reilly at 3 p.m. on Friday, May 8th.

On that same Friday, Judge Conti held a final pre-trial conference. The events preceding that conference are disputed. Reilly claims that on Wednesday, May 6th, Judge Conti's chambers had directed the attorneys for both sides to appear on Friday to file their respective trial exhibits in the courtroom. Reilly points out that after NatWest revealed on May 7th that it had discovered the Deal Files, it telephoned Judge Conti's chambers on an *ex*

parte [6] basis in an unsuccessful attempt to obtain an adjournment. Reilly contends that during that communication, NatWest must have been informed that on the agenda for the Friday conference were the consequences of its failure to produce the Deal Files earlier. Reilly's version of events is supported by Judge Conti's explanation that he held the May 8th conference "to discuss the situation *vis a vis* the newly discovered Reilly files." *See* Post-Trial Order re Motion for Sanctions at 4.

NatWest denies that it was ever told that a purpose of the May 8th conference was to discuss the consequences of its failure to timely produce the Deal Files. Rather, it understood that the parties were to appear only to deliver exhibits for Monday's trial. According to NatWest, Liddle sent Richard Palmer, a first year associate, to deliver those exhibits, but when Palmer arrived he was "ambushed" with a sanctions hearing. NatWest sees something sinister in the May 8th conference and suggests that Reilly conspired to arrange an ex parte proceeding with Judge Conti, and that Reilly was prevented from doing so only by Palmer, who just "happened to walk into the courtroom . . . in the moments before the proceeding began."

While nothing in the record disproves NatWest's accusations, Palmer began the May 8th conference by introducing himself as "Richard Palmer representing the defendant NatWest." At no point thereafter did he raise any issue of surprise or lack of notice. Instead, when Reilly's counsel - Richard Claman - renewed his earlier motion for various sanctions based on NatWest's failures [7] with respect to the Deal Files, Palmer responded by arguing:

> I believe Mr. Claman is asking for drastic measures for documents that will prove to be of

> minimum importance to this case. . . . [F]or the last year NatWest has made a considerable effort to find any remaining documents since this has been an issue and they were just stumbled upon yesterday. . . . Mr. Claman described it as gross negligence. I think NatWest's efforts in finding these were adequate. It was simply unfortunate that we didn't find them in the first place.

At the conclusion of the May 8th conference, Judge Conti granted Reilly the relief he sought (collectively, the "May 8 Rulings"). Specifically, focusing on NatWest's failure to produce the Deal Files, which he characterized as bordering on "willful" misconduct, Judge Conti ruled that: (1) an adverse inference instruction was warranted; and (2) NatWest would be barred from referring to Reilly's deposition and from using the Deal Files at trial. Judge Conti also concluded that it was appropriate to: (3) preclude the witnesses NatWest had failed to produce for deposition in response to Reilly's Rule 30(b)(6) notice; and (4) quash two subpoenas served by NatWest shortly before the May 8th conference because they were served in violation of Judge Sprizzo's order that Reilly be given five days notice of any third party subpoenas.

The damages trial began on May 11th, as scheduled. Just before the jury was selected, Reilly moved for a default judgment of $13.5 million - the amount sought by his complaint. Reilly argued that the Deal [8] Files, which he had reviewed over the weekend, had been "sanitized" so that only publicly available documents had been turned over. Judge Conti declined to grant a default judgment, but rejected Liddle's explanation for the late production of the Deal Files and adhered to his prior ruling that he would give an adverse inference instruction to the jury.

During the ensuing nine-day damages trial, Reilly identified various documents that allegedly had been withheld from the Deal Files, including documents pertaining to transactions he claimed to have been involved in for KLM Airlines, Alaska Airlines, and Bombardier, a Canadian aircraft manufacturer Reilly acknowledged that NatWest's total revenue from these and other transactions was only about $11 million. Nevertheless, he testified that the reasonable value of his services was about "$20 million." This apparent contradiction was, according to Reilly, explained by the fact that NatWest had "killed" many of his deals. In 1994, NatWest decided to redirect its focus away from underwriting and toward merger and acquisition work. It was Reilly's position that to keep this decision confidential, NatWest effected its new strategy through its credit committee which imposed commercially unreasonable requirements on his deals, thus keeping his revenues low. As a result, Reilly claimed the reasonable value of his services was not adequately reflected by the meager revenues he generated. Reilly's expert, Sorrel Mathes, supported Reilly's contention, testifying that investment banks customarily compensate bankers for all work performed, even on deals which do not close. This was so, according to Mathes, because banks place great stock in "[b]eing perceived as fair," since that allows them to retain more talented bankers, thus sustaining profits.

For the defense case, NatWest announced that it intended to [9] call: (1) Jeffrey Letzler to testify about NatWest's document retention policies; and (2) both Letzler and Joseph Adams to testify about the specifics and value of Reilly's work. Reilly's counsel reminded Judge Conti that while both Letzler and Adams were on NatWest's witness list, neither one had been made available for deposition in response to his Rule 30(b)(6) notice. Judge Conti ruled that both witnesses could testify

about the missing Deal Files; but he adhered to that part of his May 8 Ruling that neither one could testify about the value of Reilly's work.

Putting on its case, NatWest called its expert, Alan M. Johnston, who testified about the revenues generated by Reilly and who offered his opinion that the total value of Reilly's services was only about $3 million. To discredit Reilly's position that NatWest had kept his revenues low by "killing" his deals through a commercially unjustified credit crunch, Liddle also elicited testimony from Stephen Sayre that NatWest's change in credit policy was commercially reasonable. On cross-examination, Reilly's counsel attempted to rebut Sayre's testimony in this regard by pointing to his earlier deposition, in which he had admitted disagreeing with the commercial logic of NatWest's change in credit practices. Sayre responded by trying to explain that change as a reaction to "the global recession . . . in the early 1990's." Reilly's counsel countered by pointing out that 1995, the year NatWest allegedly "killed" Reilly's deals, was "a very good year in investment banking." When Sayre demurred, saying he was not "an economist," Reilly's counsel introduced, over objection, a NatWest annual report [10] showing 1995 profits of $457 million.

The damages jury found that: (1) Reilly's *quantum meruit* damages were $5.5 million; and (2) his contract damages were $2.054 million. The jury also found that the amount NatWest owed Reilly and willfully refused to pay him in violation of New York's Labor Law was $1.054 million. Judge Conti awarded Reilly twenty-five percent liquidated damages of $263,500 on that $1.054 million pursuant to Section 198(1-a) of the Labor Law. Thereafter, the court required the plaintiff to choose between the contract damages and the *quantum meruit* award, and, not

surprisingly Reilly elected to take his *quantum meruit* damages. Finally, Judge Conti awarded Reilly $1,361,250 in pre-judgment interest on the *quantum meruit* award calculated from August 25, 1995, the day after Reilly's termination. Total damages came to $7,124,750.

After trial, Judge Conti directed the parties to submit briefs on whether additional sanctions should be imposed on NatWest. Having held a hearing on the issue, Judge Conti confirmed his earlier impression that NatWest had been "grossly negligent" in: (1) searching for the Deal Files; and (2) failing to assure the integrity of the Deal Files. Despite these findings, Judge Conti declined to impose additional sanctions, or to grant Reilly's renewed motion for a default judgment. Judge Conti explained that his prior suggestion that NatWest had engaged in "willful" misconduct, had been made "at a time when I really didn't have all the facts before me."

After the post-trial sanctions hearing, NatWest filed a motion [11] pursuant to Fed. R. Civ. P. 50 and 59 for judgment as a matter of Law, which Judge Conti denied.

NatWest now appeals, arguing that Judge Conti erred when he: (1) allowed Reilly to recover *quantum meruit* damages; (2) awarded liquidated damages under the New York Labor Law; (3) awarded Reilly pre-judgment interest; (4) allowed Reilly to recover damages for 1994; (4) admitted evidence of NatWest's financial condition at trial; (5) made the May 8 Rulings; (6) imposed sanctions without due process; and (7) allowed Reilly to engage in unfair trial tactics. NatWest also requests that this case be reassigned on remand. Reilly cross appeals, arguing that Judge Conti erred when he: (1) declined to enter a default judgment against NatWest; and (2) dismissed his defamation claims.

DISCUSSION

I. *Quantum Meruit* and Contract Damages

NatWest argues that, as a matter of law, Reilly should not have been entitled to *quantum meruit* damages. We agree.

New York substantive law governs this diversity suit. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). We review a district court's interpretation of state law *de novo*. *See New York v. Blank*, 27 F.3d 783, 788 (2d Cir. 1994).

Under New York law, the existence of an express contract governing a particular subject matter ordinarily precludes recovery in *quantum meruit* for events arising out of the same subject matter. *See Clark-FitzPatrick, Inc. v. Long Island R.R. Co.*, 521 N.Y.S.2d 653, 656 (N.Y. 1987). New York courts, however, have recognized an [12] exception to this general rule and have held that in some circumstances the non-breaching party "may timely rescind and seek recovery" in *quantum meruit*. *Id.* Thus, in the employment context, an employee who is wrongfully discharged and prevented from completing the performance of his contract may choose between suing for breach of contract or for the value of the services rendered. *See Carvatt v. Lippner*, 439 N.Y.S.2d 681, 683 (2d Dep't 1981).

A. Election of Remedies

The parties dispute whether in the circumstances of this case, Reilly could elect to rescind the contract and take his *quantum meruit* recovery after the damages trial. Reilly points to some authority suggesting that *quantum meruit* damages are always available as an alternative remedy upon any breach. *See Seymore v. Reader's Digest Assn., Inc.*, 493 F. Supp. 257, 264 (S.D.N.Y. 1980). If that were so, any employee could, upon any breach however trivial, abandon the bargain memorialized by a valid contract and gamble on a higher *quantum meruit* recovery, secure in the knowledge that if he loses the gamble he may still recover under the contract. New York law does not countenance such a rule. *See Clark-Fitzpatrick*, 521 N.Y.S.2d at 656; *Babylon Assocs. v. County of Suffolk*, 475 N.Y.S.2d 869, 874 (2d Dep't. 1984); *H.B.L.R. Inc. v. Command Broadcast Inc.*, 548 N.Y.S.2d 198, 199 (1st Dep't 1989) (citing *La Rose v. Backer*, 203 N.Y.S.2d 740, 746 (3rd Dep't 1960), *aff'd*, 226 N.Y.S.2d 695 (N.Y. 1962)).

NatWest, for its part, maintains that where an employee has substantially performed under the contract he loses the right to [13] rescind and seek a *quantum meruit* remedy. While not entirely without support, *see La Rose*, 203 N.Y.S.2d at 745-46, no New York court has endorsed this specific doctrine (nor has NatWest ever proved that Reilly did substantially perform under his contract). We agree with NatWest, however, that a victim of a breach may not rescind "in the absence of compelling equitable grounds." *H.B.L.R. Inc.*, 548 N.Y.S.2d at 199; *see Babylon Assocs.*, 475 N.Y.S.2d at 874 (identifying the grounds for recission under New York law as failure of consideration, fraud in the inducement, inability to perform, or a breach that substantially defeats the purpose).

We need not decide these academic issues, interesting though they be, for the simple reason that Reilly never timely rescinded his express contract. Although a plaintiff may sometimes defer the election of remedies and seek damages from a jury on alternative theories of breach of contract and *quantum meruit*, *see* David D. Siegel, *Practice Commentaries* C3002:5, N.Y. C.P.L.R. § 3002 (McKinney 1991), *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996), this is true only where there is a dispute over the existence, scope, or enforceability of the putative contract. *See id.*; 22 N.Y. Jur.2d, *Contracts* § 532 (1996). Conceptually, the two remedies are "mutually exclusive", and the express contract controls. 22 N.Y. Jur.2d, *Contracts* § 532; *see Clark-FitzPatrick*, 521 N.Y.S.2d at 656; H.B.L.R. Inc., 548 N.Y.S.2d at 199; A. Corbin, *Corbin on Contracts*, § 1110, at 590-91 (1964).

In this case, the liability jury determined that Reilly had an enforceable contract that governed his termination. Once that jury [14] found that Reilly had an enforceable contract, he could not seek to recover under *quantum meruit* in the subsequent damages trial. Although it might be argued that Reilly could have elected to rescind his contract after the liability verdict, *see* N.Y. C.P.L.R. § 3002(e) (McKinney 1991), no grounds for such a recission are urged, nor do we find any. *See Babylon Assocs.*, 475 N.Y.S.2d at 874. "A recission amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination." *Black's Law Dictionary* 1174 (5th ed. 1979). Endeavoring to enforce one's right to damages under a valid contract that expressly governs the subject at issue - as Reilly did here - is simply irreconcilable with rescinding or "unmaking" it from the beginning and suing in *quantum meruit*. *Id.*; *see Clark-FitzPatrick*, 521 N.Y.S.2d at 656. Because Reilly "chose not to rescind the

agreement" his recovery is limited by the terms of his express contract. *Clark-Fitzpatrick*, 521 N.Y.S.2d at 656.

B. Amount of Contract Damages

Turning to the issue of how much Reilly was entitled to recover under the terms of the contract, we find it unclear how the jury arrived at $2.054 million as contract damages. That amount, when added to the $1.4 million NatWest actually paid Reilly, fixes his total compensation for 1994 and 1995 at $3.454 million, some $484,000 more than the $2.97 million provided for by the unambiguous terms of the contract. While the jury's finding in this regard may have been erroneous, we will not tarry over this issue. As is evident from NatWest's briefs, and as counsel conceded at oral [15] argument, NatWest does not challenge the amount of contract damages awarded. Accordingly, any cavil that NatWest may now have with respect to the jury's award of contract damages has been waived. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

II. Liquidated Damages Under New York Law

Under New York's Labor Law, when an employer willfully refuses to pay an employee, "the court shall allow such employee . . . an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due." N.Y. Labor Law § 198(1-a) (McKinney 1986). The Labor Law defines "wages" as the "earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." *Id.* § 190(1).

Despite this sweeping definition, NatWest maintains that Judge Conti erred in awarding liquidated damages

under the Labor Law because "incentives" like Reilly's Percentage Bonus are not "wages." NatWest relies heavily on *dicta* from *Dean Witter Reynolds, Inc. v. Ross*, 429 N.Y.S.2d 653, 658 (1st Dep't 1980), that "[t]he term 'wages,' . . . does not encompass an incentive compensation plan."

Dean Witter is unhelpful to NatWest. In that case, the employee stockbroker's contract provided that he would receive incentive pay based on the profits he generated, minus certain deductions for his administrative and trading expenses. *See* id. at 655. The Industrial Commissioner of the State of New York ordered the employer to stop taking those deductions from the employee's pay, and to reimburse the employee for the deductions already taken. [16]

The Department of Labor affirmed that order, concluding that the deductions represented withheld "wages" under the Labor Law. The Appellate Division reversed. The court stated: "[w]e hold . . . that [the Labor Department] applied the definition of the term wages' prematurely" because the " incentive pay' did not become earned" and the employee "had no vested interest in the additional compensation until . . . all appropriate adjustments were made in conformity with the incentive . . . plan." *Id.* at 658.

Dean Witter stands for the unremarkable proposition that incentive pay does not constitute a "wage" until it is actually earned and vested. This is consistent with the holdings of subsequent New York cases. *See Tuttle v. Geo. McQuesten Co.*, 642 N.Y.S.2d 356, 358 (3d Dep't 1996) (commissions based on percentage of sales were "wages" because they were "earned" and the employee had "a vested right to [them] at the time of his resignation");

because they were "earned" and the employee had "a vested right to [them] at the time of his resignation"); *Daley v. Related Cos.*, 581 N.Y.S.2d 758, 759, 762 (1st Dep't 1992) (compensation comprised of "commissions based on [percentage of] real estate syndications" were "wages" covered by the Labor Law).

Here, Reilly's pay was guaranteed under the Percentage Bonus formula to be a percentage of the revenue he generated, and was not left to NatWest's discretion. The jury found that NatWest owed Reilly $2.054 million under his contract, but that it willfully withheld $1.054 million from that amount. Unlike the employee in Dean Witter, Reilly was clearly entitled to that $1.054 million as earned and vested compensation. *See Weiner v. Diebold Group, Inc.*, 568 N.Y.S.2d 959, 961 (1st Dep't 1991). As such, Reilly's [17] Percentage Bonus falls comfortably within the definition of a "commission" that is expressly included within the Labor Law's definition of "wages." N.Y. Labor Law § 190(1); *see Caruso v. Allnet Communications Servs. Inc.*, 662 N.Y.S.2d 468, 469 (1st Dep't 1997) (" 'commission' . . . is generally viewed as earned non forfeitable compensation") (citing *Tuttle*, 642 N.Y.S.2d at 358).

III. Pre-Judgment Interest

Relying on *In re CIS Corp.*, 206 B.R. 680 (Bankr. S.D.N.Y.1997), NatWest argues that Reilly's award of liquidated damages on his Labor Law claim is intended to be in lieu of interest; and, therefore, he is not entitled to pre-judgment interest on his contract damages pursuant to N.Y. C.P.L.R. § 5001(a) (McKinney Supp.1999). In *CIS*, 206 B.R. at 690, the bankruptcy court declined to grant pre-judgment interest on the ground that: Since liquidated damages [under the Labor Law] are in the nature of

. both pre-judgment interest and liquidated damages would provide [plaintiff] redress twice for the same loss. This rationale is unpersuasive. Pre-judgment interest and liquidated damages under the Labor Law are not functional equivalents. "The purpose of a prejudgment interest award in a wrongful termination case is to compensate a plaintiff for the loss of use of money." *Chandler v. Bombardier Capital Inc.*, 44 F.3d 80, 83 (2d Cir. 1994). In contrast, liquidated damages under the Labor Law "constitute a penalty" to deter an employer's willful withholding of wages due. *Carter v. Frito-Lay Inc.*, 425 N.Y.S.2d 115, 116 (lst Dep't 1980), *aff'd.*, 438 N.Y.S.2d 80 (N.Y. 1981). [18]

Accordingly, because liquidated damages under the Labor Law and pre-judgment interest serve fundamentally different purposes, on remand the district court shall award Reilly pre-judgment interest on the $2.054 million awarded in contract damages. *See* N.Y. C.P.L.R. § 5001(a). Because NatWest would not have paid Reilly that $2.054 million on one fixed date, however, the district court should award interest from a date to be determined in accordance with New York law. *See* C.P.L.R. § 5001(b) (McKinney Supp. 1999) ("[w]here . . . damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all the damages from a single reasonable intermediate date").

IV. 1994 Damages

NatWest next contends that Judge Conti erred in giving the jury a verdict form asking for a "lump-sum" damages amount for both 1994 and 1995. According to NatWest, Reilly's contract was divisible because it was expressly apportioned into two separate employment periods - 1994 and 1995 - with separate compensation

terms for each year. Pointing out that the liability jury found that Reilly's contract was breached in 1995, NatWest claims that the damages jury should never have been allowed to consider contract damages for 1994. This is so, according to NatWest, because a plaintiff cannot recover damages under a divisible contract "for the parts completed 1 before the contract is breached." NatWest misapprehends the nature of a divisible contract.

A divisible contract "differs from other contracts only in the respect that on performance by on party of each of its successive [19] divisions, the other party becomes liable for his or her performance of that division." 22 N.Y. Jur.2d, *Contracts* § 269 (1996) (citing *Rhine v. New York Life Ins. Co.*, 289 N.Y.S. 117, 123 (1st Dep't), *aff'd*. 273 N.Y. 1 (N.Y. 1936)). Thus, while an employee may sometimes be barred from recovering under that part of a divisible contract that he or she has fully performed, this is so only if the employee has "received *in full* the apportioned equivalent of [the employer's] performance." 5 *Corbin on Contracts*, § 1111, at 591 (emphasis added). Otherwise, as in any breach of contract case, "the employee has a right to the payment of the wage installment; and the duty of the employer to pay that amount is a contract debt." *Id.* § 1095, at 515; *See*, e.g., *Medecon Office Systems, Inc. v. Patterson, Zimmerman & Hodes, P.C.*, 561 N.Y.S.2d 646, 646 (2d Dep't 1990) (plaintiff entitled to full payment for work actually performed under part of divisible contract).

In short, even if Reilly's contract were divisible, that does not mean he is barred from recovering damages for 1994, so long as such damages were actually due. From the outset of this litigation, Reilly has consistently maintained that NatWest owed him money for 1994, alleging in his complaint that "NatWest has breached its obligation . . . to

pay . . . $242,562 earned by Reilly for the '1994' year." It was not error, therefore, for the district court to solicit a "lump-sum" damages figure from the jury.

V. The "Wealth" Evidence

NatWest argues that admitting its annual report as evidence of its financial condition requires reversal. NatWest asserts that the [20] evidence of its $457 million profit in 1995 was improperly admitted because it did not actually contradict Sayre's testimony that there was a recession in the early 1990's. We disagree.

A trial court's evidentiary rulings are entitled to substantial deference, and are reviewed only for clear abuse of discretion. *See Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 619-20 (2d Cir. 1991). "Further, even an erroneous evidentiary ruling will not lead to reversal unless affirmance would be inconsistent with substantial justice.'" *Perry v. Ethan Allen Inc.*, 115 F.3d 143, 150 (2d Cir. 1997) (quoting Fed. R. Civ. P. 61).

Evidence of wealth, "which can be taken as suggesting that the defendant should respond in damages because he is rich," is generally inadmissible in trials not involving punitive damages. *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970); *see* Joseph M. McLaughlin, *Weinstein's Federal Evidence* § 401.08[6] (2d ed. 1998). Nevertheless, such evidence may be admitted to impeach the testimony of a witness who "open[s] the door" to the subject. *Textile Deliveries, Inc. v. Stagno*, 52 F.3d 46, 49 (2d Cir. 1995). Of course, to be admitted for this purpose, the wealth evidence must actually be inconsistent with the witnesses's testimony. *See United States v. Hale*, 422 U.S. 171, 176 (1975).

We agree with NatWest that the wealth evidence did not directly contradict Sayre's testimony, and that its introduction may have been somewhat opportunistic. Nevertheless, that evidence was sufficiently inconsistent with Sayre's testimony to impeach his credibility. Specifically, the wealth evidence revealed that Sayre [21] - to paraphrase his own term - was being somewhat economical with the truth. Sayre suggested that the early 1990's recession was a legitimate business reason for NatWest's decision to tighten credit in 1995. In response, Reilly was entitled to contend that NatWest turned a tidy profit in 1995 and that, therefore, its decision to tighten credit in that year was commercially unsound. In any case, even if Reilly's attempt to impeach Sayre's credibility was prejudicial, any prejudice was dissipated by Judge Conti's instruction to the jury that a party's wealth "must not enter into your judgment nor influence your decision in any respect."

VI. The May 8 Rulings

NatWest next raises substantive objections to each of the May 8 Rulings, none of which warrant reversal.

Whether exercising its inherent power, or acting pursuant to Rule 37, a district court has wide discretion in sanctioning a party for discovery abuses, *see New York State NOW v. Terry*, 886 F.2d 1339, 1354 (2d Cir. 1989), ~~and for~~ the spoliation of evidence. *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

A. The adverse inference instruction

At the beginning and close of trial Judge Conti instructed the jury that if Reilly proved that: (1) NatWest had failed to deliver the Deal Files in a timely fashion or that it delivered them incomplete; and (2) that such "nondelivery" prejudiced Reilly because the files were important to him, "then you can infer these matters in his favor and against NatWest." The court premised this [22] instruction on its finding that NatWest had acted with "gross negligence" in searching for, and preserving, the Deal Files.

The law in this Circuit regarding the level of fault necessary to justify an adverse inference instruction is unsettled. In *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), it is suggested that district courts must find that a party intentionally destroyed evidence before giving an adverse inference instruction. *See id.* at 126-127 & n.11 (2d Cir. 1998) (citing *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988)). Similarly in *Berkovich v. Hicks*, 922 F.2d 1018, 1024 (2d Cir. 1991), we affirmed a district court's refusal to grant a plaintiff an adverse inference instruction, noting that absent "any evidence of bad faith," plaintiff was not entitled to such an instruction. *Berkovich*, however, avoided announcing a *per se* rule; instead it explicitly limited its holding to "the facts of this case," thereby leaving open the possibility that, in certain circumstances, an adverse inference instruction would be appropriate even without a finding of bad faith. *See id.*

We do not read either *Kronisch* or *Berkovich* as an absolute prohibition against granting an adverse inference instruction where there is no bad faith but there is gross negligence. To the contrary, we have previously approved

more severe sanctions based solely on gross negligence. *See Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1064 (2d Cir. 1979) (holding that a plaintiff's grossly negligent failure to produce discovery justified the preclusion of all evidence related to [23] damages, even though that sanction was "tantamount to a dismissal" of plaintiff's claim).

Our case-by-case approach to the failure to produce relevant evidence seems to be working. Such failures occur "along a continuum of fault - ranging from innocence through the degrees of negligence to intentionality." *Welsh*, 844 F.2d at 1246. Trial judges should have the leeway to tailor sanctions to insure that spoliators do not benefit from their wrongdoing - a remedial purpose that is best adjusted according to the facts and evidentiary posture of each case. *See West*, 167 F.3d at 779. As other Circuits have recognized, it makes little sense to confine promotion of that remedial purpose to cases involving only outrageous culpability, where the party victimized by the spoliation is prejudiced irrespective of whether the spoliator acted with intent or gross negligence. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Pressey v. Patterson*, 898 F.2d 1018, 1023-24 (5th Cir. 1990); *Welsh*, 844 F.2d at 1246.

Thus, we hold that a finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator with an adverse inference instruction. Here, it is clear that NatWest exhibited at least the gross negligence found by Judge Conti in light of: (1) NatWest's failure to produce the Deal Files until the eleventh hour; and (2) Reilly's showing at trial - through the identification of missing documents - that NatWest "sanitized" those files. In these circumstances, we cannot say that the district [24] court

abused its discretion by granting Reilly an adverse inference instruction.

B. Preclusion of NatWest's additional "fact" witnesses

NatWest maintains that Judge Conti abused his discretion when 5 he precluded "all five" of its "fact witnesses" who were not produced for deposition in response to Reilly's Rule 30(b)(6) 5 notice. We disagree.

First of all, the district court did not, as NatWest alleges, actually preclude five "fact witnesses" from testifying. Instead, Judge Conti authorized NatWest to call Letzler and/or Adams to testify about its document retention policies, even though neither witness had been produced in response to Reilly's Rule 30(b)(6) notice. NatWest chose not to call either witness on the subject of document retention. Nor did it call any other witness who, it now claims, would have testified to some unspecified "facts." Because we cannot know whether any witnesses called would have been precluded had they, like Adams and Letzler, been offered at trial, we deem NatWest's challenge to their purported preclusion an issue not actually "passed upon below" and therefore waived. *See Austin v. Healey*, 5 F.3d 598, 601 (2d Cir. 1993) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). Thus, we confine our analysis to whether Judge Conti abused his discretion in precluding Letzler and Adams from testifying about Reilly's work (testimony that remains germane to this appeal notwithstanding our rejection of Reilly's *quantum meruit* claim because it would also have been relevant to the revenues generated by Reilly for purposes of his contract claim). [25]

Under Rule 30(b)(6), when a party seeking to depose a corporation announces the subject matter of the proposed

deposition, the corporation must produce someone familiar with that subject. *See* Fed. R. Civ. P. 30(b)(6); James Wm. Moore et al., *Moore's Federal Practice*, 130.25[3] (3d ed. 1998). To satisfy Rule 30(b)(6), the corporate deponent has an affirmative duty to make available "such number of persons as will" be able "to give complete, knowledgeable and binding answers" on its behalf. *Securities & Exchange Comm'n v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (quotations omitted); *see Moore's Federal Practice*, at 530.25. When a party fails to comply with Rule 30(b)(6), Rule 37 allows courts to impose various sanctions, including the preclusion of evidence. *See* Fed. R. Civ. P. 37(b)(2)(B); *see, e.g., Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 770-71 (9th Cir. 1995).

To comply with Rule 30(b)(6), as well as Judge Sprizzo's order regarding the completion of discovery, NatWest was required to produce for deposition by March 31, 1998 such of its representatives who were familiar with the specifics and thus the value of Reilly's work. NatWest chose to produce only Sayre by that date, despite Reilly's complaints that Sayre was not sufficiently knowledgeable about Reilly's work. Nevertheless, before and during trial, NatWest sought to have Adams and Letzler testify on that very issue, claiming that they were knowledgeable in that area. By failing to produce Adams and Letzler for deposition, NatWest violated Rule 30(b)(6). Moreover, by failing to produce those witnesses in a [26] timely fashion, NatWest violated Judge Sprizzo's order regarding the completion of discovery.

Having determined that NatWest violated both Rule 30(b)(6) and Judge Sprizzo's order, we have little difficulty in concluding that barring Adams and Letzler from testifying about Reilly's work was proper. In assessing the

propriety of a district court's preclusion of witness testimony, we consider the following factors:

> (1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance.

Softel Inc. v. Dragon Medical Scientific Comm. Inc., 118 F.3d 955, 961 (2d Cir. 1997); *see Outley v. City of New York*, 837 F.2d 587, 590-91 (2d Cir. 1988). Judge Conti did not abuse his discretion in precluding the testimony of Adams and Letzler because: (1) even to this day NatWest has never explained why they were not made available for deposition; (2) their testimony would have been cumulative in light of the testimony of NatWest's expert, Johnson and, to a lesser extent, of Sayre on the subject of Reilly's work; (3) Reilly would have been prejudiced by the fact that he did not have an opportunity to depose them; and (4) due to what would have been the cumulative nature of their testimony, delaying the trial to allow Reilly to conduct such a deposition would have been wholly unwarranted. *See Softel*, 118 F.3d at 961-63.

C. Other allegedly improper May 8 Rulings

In view of NatWest's failure to produce the Deal Files until [27] the eve of trial, we cannot say that the district court abused its discretion by barring NatWest from using those files at trial. *See Softel*, 118 F.3d at 963; *Cine Forty-Second St. Theatre Corp.*, 602 F.2d at 1068. In any case, any error was harmless, as even now NatWest cannot point

to a single document from those files that could have been important to its case. Instead, it argues only that it would have used the Deal Files to demonstrate the lack of documentation substantiating Reilly's contract claims. As NatWest is aware, however, Reilly himself complained about the lack of such documentation repeatedly during trial. Thus, NatWest has failed to show prejudice arising from the preclusion of the Deal Files.

Similarly, Judge Conti did not abuse his discretion in barring NatWest from using Reilly's deposition to impeach his testimony at trial. During that deposition, Liddle questioned Reilly repeatedly about the extent of his participation in various transactions. Frequently, Reilly was unable to give specific answers because he did not have his Deal Files. Preventing NatWest from capitalizing on Reilly's inability to describe his specific participation in various transactions was an eminently fair exercise of Judge Conti's discretion.

Finally, the trial judge did not abuse his discretion in quashing the third party subpoenas served in violation of Judge Sprizzo's unequivocal order that Reilly receive five days notice of such subpoenas. NatWest contends that because that order had been issued before the liability trial, it did not apply to damages discovery. The record simply does not support that contention. [28]

VII. Due Process

NatWest argues that the May 8th Rulings were essentially sanctions and that they were imposed without affording it due process. We disagree.

We review a sanctions decision for abuse of discretion. *see Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96

(2d Cir. 1997), mindful that a district court necessarily abuses its discretion when it imposes sanctions without due process. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

"[D]ue process requires that courts provide notice and an opportunity to be heard before imposing any kind of sanctions." *In re Ames Dept. Stores, Inc.*, 76 F.3d 66, 70 (2d Cir. 1996) (emphasis in original) (citing *Martin v. Brown*, 63 F.3d 1252, 1262 (3d Cir. 1995)). While we have not hesitated to reverse where there is "no indication" that a sanctioned party was afforded notice of the particular sanctions sought, *Sakon v. Andreo*, 119 F.3d 109, 114 (2d Cir. 1997); *see Ted Lapidus*, 112 F.3d at 96, or where the party is not permitted to argue against the sanctions imposed, *see Schoenbera v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 927 (2d Cir. 1992), we have also recognized that the requirements of due process cannot be cabined within an inflexible regime, and must vary with each case. *See, e.g.: International Ore & Fertilizer Corp. v. SGS Control Servs. Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994); *see also Martin*, 63 F.3d at 1262. Thus, in the Rule 37 context, we have declined to impose rigid requirements on either the timing or the form of the notice afforded to a sanctioned party. *See*, e.g., *Fonar Corp. v.* [29] *Magnetic Resonance Plus Inc.*, 128 F.3d 99, 102 (2d Cir. 1997) (per curiam) (motion filed one day prior to district court's preliminary sanctions decision provided sufficient notice). Nor have we required that a party always be allowed to argue orally. *See, e.g.:, International Ore*, 38 F.3d at 1286 (party filing affidavit that failed to address pending sanctions motion nevertheless had sufficient opportunity to be heard).

Here, NatWest received all the process it was due. As a preliminary matter, in the circumstances of this case we

cannot agree with Reilly that none of the May 8 Rulings were actually sanctions, but were instead merely "trial-management rulings" to which the protections of due process do not attach. *See West*, 167 F.3d at 780 (characterizing adverse inference instruction as a "sanction"); *Outley*, 837 F.2d at 590-91 (treating preclusion of testimony as a "sanction"); *see also G.J.B. & Associates, Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990) ("the process due if a district court threatens to strike testimony is more substantial than that required for the imposition of attorneys' fees and costs related to a deposition, the latter being a relatively moderate sanction.").

Nevertheless, not all the May 8 Rulings may be characterized as sanctions to which the requirements of particularized notice attach. Judge Conti's decision to quash the trial subpoenas served in violation of Judge Sprizzo's prior order, was, or should have been, entirely foreseeable to NatWest. Parties and counsel have no I absolute right "to be warned that they disobey court orders at their [30] peril." *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1366 (2d Cir. 1991). Similarly, NatWest had an adequate opportunity to argue against the preclusion of the proposed testimony of Adams and Letzler, where Judge Sprizzo's discovery order required their depositions prior to March 31, 1998, and where NatWest had specific notice as of May 5, 199[8] that Reilly sought such preclusion. *See International Ore & Fertilizer Corp.*, 38 F.3d at 1286.

Nor did Judge Conti deprive NatWest of notice and an opportunity to be heard before imposing the sanctions related to the Deal Files. NatWest was on notice as of May 5th that Reilly sought sanctions arising from its failure to produce those files, and Palmer was given an opportunity

to, and did, argue against such sanctions at the May 8th conference. That Palmer, a first year associate, was the sole representative of NatWest at the May 8th conference does not mean that the adverse inference instruction was given without due process. In the present circumstances, we see no reason to eschew application of the general rule that civil litigants are bound by the acts and omissions of their freely selected attorneys. *See Securities and Exch. Comm'n v. McNulty*, 137 F.3d 732, 739 (2d Cir. 1998). Moreover, on May 11th, just before trial began, Liddle himself attempted to explain NatWest's failure to produce the Deal Files. The fact that Judge Conti rejected that explanation does not give rise to a due process violation.

VIII. Unfair Trial Tactics

NatWest complains that Judge Conti improperly allowed Reilly to appeal to the emotions of the jury during trial by: (1) repeatedly [31] accusing NatWest of discovery wrongdoing; (2) encouraging the jury to "send a message" to NatWest that contracts mean something; and (3) telling the jury that NatWest had been found guilty of "willful" and "wrongful" discharge. We disagree. A district court is entitled to give attorneys wide latitude in formulating their arguments. *See Matthews v. CTI Container Transp. Int'l Inc.*, 871 F.2d 270, 278 (2d Cir. 1989). Rarely will an attorney's conduct so infect a trial with "undue prejudice or passion" as to require reversal. *See id.* In this case, we are satisfied that the conduct of Reilly's counsel was not so prejudicial as to warrant a new trial.

IX. Reilly's Cross-Appeals

Reilly cross-appeals the district court's denial of his motion for a default judgment and dismissal of his defamation claims. These cross-appeals are denied.

First, Judge Conti did not abuse his discretion in declining to grant Reilly the ultimate sanction of a default judgment and in determining that the lesser sanction of an adverse inference instruction was sufficient to redress NatWest's gross negligence with respect to the Deal Files. *See West*, 167 F.3d at 780.

Second, Judge Conti properly dismissed Reilly's defamation claims. The first alleged defamation arose from a conversation between Adams and Peter Hall, two of Reilly's superiors at NatWest, during which Adams allegedly told Hall that Reilly's performance was unsatisfactory. This claim was properly dismissed as a statement of opinion. *See Williams v. Varig Brazilian Airlines*, 564 N.Y.S.2d [32] 328, 331 (1st Dep't) (criticism of an employee's work performance is opinion and cannot be defamatory), *lv. to appeal denied*, 573 N.Y.S.2d 467 (1991). The second alleged defamation also was properly dismissed. While plaintiffs are not required to plead defamation *in haec verba*, Reilly's unsupported claim that Adams said "something bad" about him to a client failed to afford NatWest "sufficient notice of the communications complained of to enable [it] to defend itself]." *Kelly v. Schmidberger*, 806 F.2d 44, 46 (2d Cir. 1986) (citation omitted).

X. Reassignment

As a final matter, we address NatWest's request that this case be reassigned on remand to a district judge who was not involved in the original proceedings. We note that in light of our disposition of this appeal, the only issues that remain for remand are: (1) the amount of pre-judgment interest Reilly is entitled to on his contract damages; and (2) the amount of attorney's fees Reilly is entitled to

pursuant to § 198(1-a) of the Labor Law, a question not litigated on this appeal. In any event, we are unconvinced that reassignment would further the appearance of justice, or that either of the judges who were involved in the original proceedings would have any difficulty putting aside previously expressed views. *See United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (*en banc*). Nor has any showing of personal bias been made. *See* id. (citing 28 U.S.C. § 144). Accordingly, we decline to require reassignment of this case. [33]

CONCLUSION

We have considered the parties' remaining contentions and find them to be without merit. The award of *quantum meruit* damages is reversed, and this case is remanded for entry of judgment in favor of Reilly on his contract damages of $2.054 million. The district court shall award pre-judgment interest on those damages from a date to be determined in accordance with New York law. The award of liquidated damages under the Labor Law is affirmed. Judge Conti's refusal to award Reilly a default judgment is affirmed as is his dismissal of Reilly's defamation claims.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL T. REILLY,	)	
Plaintiff,	)	No. 96-CV0641
	)	(JES) SC
	)	
v.	)	ORDER RE MOTION FOR
	)	A NEW TRIAL, AND
	)	MOTION FOR JUDGMENT
NATWEST MARKETS	)	AS A MATTER OF LAW
GROUP,	)	
INC., et al.,	)	
Defendants.	)	
_____	)	

I. INTRODUCTION

The above captioned action is a breach of contract case. Plaintiff Michael Reilly ("Reilly") was employed by defendants (collectively "NatWest") under terms dictated by an employment contract. At the liability phase of this trial, that jury found that NatWest breached this employment contract. At the damages portion, the jury made the following findings: (1) damages in the amount of $5.5 million under a *quantum meruit* theory; (2) $1,054,000 was intentionally withheld from Reilly by NatWest that was not a result of a bona fide dispute; (3) damages in the amount of $2.054 million under a breach of contract theory. This order addresses NatWest's motion for judgment as a matter of law and motion for a new trial.

II. DISCUSSION

A. Judgment an a Matter of Law

Judgment as a matter of law under Rule 50(b) is only "appropriate when there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (where there is) such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded (persons) cannot arrive at a verdict against (the movant)." *Logan v. Bennington College Corp.*, 72 F.3d 1017, 1022 (2d Cir. 1995) (citations omitted). The only procedurally proper argument made by NatWest is that *quantum meruit* damages were not properly recoverable. The Court has already expressly rejected the legal basis of that argument in its May 6, 1998 Order. That order explicitly indicated that *quantum meruit* is an alternative compensation remedy for an employee whose employer has breached an employment contract, and was therefore applicable in the instant case. Accordingly, the only issue remaining for this motion is whether there was sufficient evidence in the case from which, the jury could have returned its verdict. The Court finds that there was. Therefore, NatWest's motion must be denied.

NatWest also seeks a judgment as a matter of law regarding the jury's finding of the breach of contract claim. The Court finds that there was sufficient evidence from which the jury could have returned its verdict regarding the breach of contract damages. Accordingly NatWest's motion must be denied.

B. Motion for a New Trial

Under Rule 59 a new trial will not be granted on grounds not called to the court's attention unless the error was so fundamental that gross injustice would result. *Datskow v. Teledyne Continental Motors Aircraft Products*, 826 F. Supp. 677, 687 (W.D.N.Y. 1993). Moreover, such motion should be granted only "if it is quite clear that the jury reached a seriously erroneous result." *Bergstein v. Jordache Enterprises, Inc.*, 1996 WL 271910 (S.D.N.Y. 1996)

The Court finds that the jury's verdict was supported by the great weight of the evidence. In addition, there were no errors which would otherwise make a new trial necessary. Accordingly, NatWest's motion must be denied.

C. Additional Issues

The Court finds that NatWest's motion raised a number of arguments that has already been before the Court on numerous occasions. Accordingly, the Court awards Reilly attorneys' fees for the cost of responding to this motion. In addition, NatWest has moved the Court to correct clerical mistake in the judgment. That motion is granted. The proper total amount of the judgment is $7,124,750 ($5,500,000 for *quantum meruit*, $1,361,250 in prejudgment interest; and, $263,500 under the New York Labor Law).

III. CONCLUSION

For the aforementioned reasons, NatWest's motion for a new trial is hereby DENIED, NatWest's motion for judgment as a matter of law is hereby DENIED and it's

motion for a correction of judgment is hereby GRANTED.

IT IS SO ORDERED.

Dated: August 11, 1998.

/s/ Samuel Conti
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MICHAEL T. REILLY, Plaintiff,	)	
	)	No. 96-cv-0641
NATWEST MARKETS GROUP INC., et al.,	)	(JES) SC
	)	AMENDED
Defendants.	)	JUDGMENT
	)	

In accordance with the jury's verdict of May 21, 1998 and the order of August 11, 1998 amending the judgment, it is hereby ORDERED, ADJUDGED, and DECREED that judgment be entered in this action in favor of the plaintiff in the amount of $5.5 million for quantum meruit damages, $263,500 penalty under the New York Labor Law and $1,361,250 in prejudgment interest for a total of $7,124,750. Judgment is further entered in favor of plaintiff and against defendant for attorney's fees.

IT IS SO ORDERED.
Dated: Aug 11, 1998

s/ Samuel Conti
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MICHAEL T. REILLY,	)	
	)	No. 96-cv-0641
Plaintiff,	)	(JES) SC
	)	
NATWEST MARKETS GROUP INC., et al.,	)	ORDER RE POST-TRIAL ISSUES
	)	
	)	
Defendants.	)	
	)	

I. INTRODUCTION

The above captioned action is a breach of contract case Plaintiff Michael Reilly ("Reilly") was employed by defendants (collectively, "NatWest") under terms dictated by an employment contract. At the liability phase of this trial, the jury found that NatWest breached this employment contract. At the damages portion, the jury made the following findings: (1) damages in the amount of $5.5 million under a quantum meruit theory; (2) $1,054,000 was intentionally withheld from Reilly by NatWest that was not a result of a bona fide dispute; (3) damages in the amount of $2.054 million under a breach of contract theory. This order addresses collateral issues arising from this verdict.

II. DISCUSSION

A. Prejudgment Interest

The first issue is whether Reilly entitled to prejudgment interest on his quantum meruit recovery.

New York Civil Practice Law and Rules §5001(a) provides that "interest shall be recovered upon a sum awarded because of a breach of performance of a contract . . . , except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion." Under New York law, a quantum meruit claim for services rendered is an action at law, and therefore prejudgment interest is mandatory. *Ogletree, Deakins, Nash, Smoak & Stewart v. Albany Steel, Inc.*, 663 N.Y.S 2d 313, 315 (3rd Dep't 1997); *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff*, 638 F. Supp. 714, 721 (S.D.N.Y. 1986). Moreover, because quantum meruit damages are as an alternative for breach of contract damages, the Court finds that, even if quantum meruit were an equitable remedy, the Court would make a discretionary award of prejudgment interest. The Court therefore determines that, under Reilly's quantum meruit award, Reilly is entitled to prejudgment interest from August 25, 1995, the date he was terminated in breach of his contract. The Court accordingly awards him the sum of $1,361,250 (9% per annum x 33 months x $5.5 million judgment).

B. Labor Law Claim

The next issue is whether Reilly is entitled to the attorney's fees and/or the 25% liquidated damages provision found in New York Labor Law § 198(1-a). That statute provides:

> In any action instituted upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional twenty-five percent of the total amount of the wages found to be due.

NatWest argues that Reilly is unable to collect either of these two penalties because he has elected to accept the jury's quantum meruit damages, and these damages are not "wages." The Court does not agree. Under New York law, "[a]n employee who is wrongfully discharged may treat the contract as continuing and sue for damages for the breach, or may rescind the contract and sue for the value of services actually rendered." *Carvatt v. Lippner*, 439 NYS 2d 681, 683 (2d Dep't 1981); *see also Seymore v. Reader's Digest Association, Inc.*, 493 F. Supp. 257, 264 (S.D.N.Y. 1980) ("where an employment contract has been breached by an employer, the aggrieved employee may elect between suing for his compensation under the terms of the contract or suing in quantum meruit . . ."). These cases indicate that quantum meruit is simply an alternative form of compensation for an employee whose employer has breached an employment contract. Since an employment contract provides for money in exchange for services, the Court finds that such damages should be regarded as wages. In addition, on June 2, 1997, during the liability phase of the trial, the Court held that §193 of

the New York Labor Law applied to this action, determining that the monies withheld from Reilly were wages for the purposes of that section. The fact that Reilly has opted to recover in quantum meruit does not change the nature of the monies withheld.

Regardless of which path Reilly has elected, NatWest willfully withheld monies due to Reilly that were not part of a bona fide dispute. The jury found that the amount of the wages intentionally withheld was $1,054,000; therefore the 25% penalty provision of the New York Labor Law results in a penalty of $263,[5]00.

The New York Labor Law also entitles a prevailing party to attorney's fees. NatWest challenges the applicability of this provision to the quantum meruit recovery. The Court determines that, to the extent that the quantum meruit recovery exceeds monies that were owed above and beyond the contract damages, these monies cannot be considered wages because they were not owing and due to Reilly.[1] In cases in which attorney's fees are available for some, but not all, damage awards courts have looked to whether there is a common core of facts between the different claims in order to award attorney's fees. *See e.g., Lunday v. City of Albany*, 42 F3d 131 (2d Cir. 1994). The Court, therefore, finds that Reilly is entitled to attorney's fees based on the presentation of the core case relevant to the Labor Law claim, and awards attorney fees for all work regarding the liability phase of the trial and that portion of the damages phase involving damages due up to and including August 24, 1995. Any attorney's fees expended

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1. The determination does not affect the resolution of the liquidated damages provision as the entire $1.054 million was owing to Reilly.

in pursuit of damages occurring after that date are not recoverable.

C. Sanctions.

Reilly has also moved the Court for sanctions against NatWest arising from its late document production. The burden is on Reilly to establish what damages he sustained or to what extent the presentation of his case was hindered by NatWest's actions in violation of court orders regarding discovery. The Court will conduct a hearing on Tuesday, June 9, 1998 at 9:30 a.m. regarding sanctions. At said hearing, Reilly shall present a history of the orders regarding discovery and NatWest's purported violations thereof. NatWest shall present evidence in rebuttal to these claims.

IT IS SO ORDERED.
Dated: June 3, 1998.

/s Samuel Conti
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MICHAEL T. REILLY,	)	
	)	No. 96-cv-0641
Plaintiff,	)	(JES) SC
	)	
NATWEST MARKETS GROUP INC., et al.,	)	ORDER RE PRETRIAL ISSUES
	)	
Defendants.	)	
	)	

I. INTRODUCTION

The above captioned action is a breach of contract case. Plaintiff Michael Reilly ("Reilly") was employed by defendants (collectively, "NatWest") under terms dictated by an employment contract. At the liability phase of this trial, the jury found that NatWest breached this employment contract. At the liability phase of this trial, the jury found that NatWest breached this employment contract. This order concerns issues pertaining to the damages phase of this bifurcated trial.

II. DISCUSSION

A. Quantum Meruit

The first issue is whether Reilly may recover under the damages theory known as *quantum meruit*. The law in New York allows Reilly to do so. "An employee who is wrongfully discharged may treat the contract as continuing and sue for damages for the breach, or may rescind the

contract and sue for the value of services actually rendered." *Carvatt v. Lippner*, 439 NYS 2d 681, 683 (2d Dep't 1981); *see also Seymore v. Reader's Digest Association, Inc.*, 493 F. Supp. 257, 264 (S.D.N.Y. 1980) ("where an employment contract has been breached by an employer, the aggrieved employee may elect between suing for his compensation under the terms of the contract or suing in *quantum meruit* . . .).

In addition, the Court hereby determines that Reilly may pursue his *quantum meruit* claim before the jury. *GSGSB, Inc., v. New York Yankees*, 1995 WL 507246 (S.D.N.Y.) holds that a plaintiff has a right to have a jury consider the amount due under a *quantum meruit* theory, *Id.* at *5. For the reasons contained therein, the Court agrees.

Moreover, Reilly may submit both the *quantum meruit* theory and the breach of contract theory to the jury. *Quantum meruit* and breach of contract theories may be submitted to a jury simultaneously. *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996). In this action, Reilly may make his election after the jury returns its decision. *See US East Telecommunications, Inc. v. US West Information Systems, Inc.*, 1993 WL 385810 (S.D.N.Y.), *aff'd*, 38 F.3d 1289 (2d Cir. 1994).

B. Labor Law

On June 2, 1997, during the liability phase of the trial, the Court held that §193 of the New York Labor Law applied to this action. Defendants now argue that the jury's verdict does not support a violation of §193. The Court cannot agree. The jury found that there was a willful failure on the part of the defendants to pay Reilly. This is exactly the type of self-help remedy contemplated by Section 193.

C. Gleacher

NatWest has sought to exclude all evidence concerning its purchase of Gleacher & Co. The Court hereby determines that both the acquisition price paid for Gleacher & Co. and the salaries paid to Gleacher employees should be excluded under Fed. R. Evid. 403. Reilly may, however, discuss the Gleacher transaction as it pertains to the cancellation of potential deals that might have brought about additional compensation. *See Prescott v. Buffalo Fire Appliance Corp.*, 237 AD 198, 260 N.Y.S. 840 (2d Dep't), *aff'd*, 262 N.Y. 475 (1933).

IT IS SO ORDERED.
Dated: May 6, 1998.

s/Samuel Conti
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of July one thousand nine hundred and nine

Present:
Hon. Joseph M. McLaughlin,
Hon. Guido Calabresi
Hon. John R. Gibson*

Circuit Judges

Reilly

Appellee

v Docket No. 98-7968

Natwest Markets

Appellant

A petition for panel rehearing having been filed herein by Michael T. Reilly.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
Karen Greve Milton, Acting Clerk

By /s/
Beth J. Meador,
Administrative Attorney

*The Honorable John R. Gibson, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

28 USC Sec. 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)

(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity

for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

28 USC Sec. 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

28 USC Sec. 2105. Scope of review; abatement

There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

28 USC Sec. 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Seventh Amendment to the US Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, other than according to the rules of the common law.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHAEL T. REILLY,
Plaintiff

96 Civ. 0641 (SC)

vs. VERDICT

NATWEST MARKETS GROUP, INC.,
and NATWEST MARKETS,
a division of NATIONAL WESTMINSTER
BANK, Plc.,
Defendants and
Counterclaim Plaintiffs

vs.

FULCRUM FINANCIAL ADVISORS, LTD.,
FULCRUM INTERNATIONAL LIMITED,
AND R-CAP CORPORATION,

Additional Defendants on
the Counter Claims

The jury is requested to answer the following questions.

We the jury unanimously find as follows:

(1) Did the defendants NatWest breach plaintiff Michael Reilly's employment contract and terminate him without cause?

YES
NO

(2) If you answered yes to question (1) above, on what date was Michael Reilly's employment terminated by defendants?

Date Employment Terminated: 8/24/95

(3) Was there willful failure on the part of the defendants to pay plaintiff Michael Reilly monies owed to him that he had earned prior to and on the date of his termination?

YES √
NO

(4) Did Michael Reilly breach his fiduciary duty to defendants?

YES
NO √

(5) If you answered yes to question (4), what was the date of Michael Reilly's breach of his fiduciary duty?

Date of Breach: N/A

(6) Did Michael Reilly breach his employment contract with NatWest?

YES
NO √

(7) If you answered yes to question (6), what was the date of Michael Reilly's breach of the employment contract?

Date of Breach: N/A

(8) Did Michael Reilly interfere with NatWest's alleged prospective contract with UPS?

YES
NO √

Dated: June 9, 1997.

/s/ Thomas M. Enright
Foreperson